South Asian Journal of Law & Policy

ISSN: 2616-8197

Volume 1

2021

Editorial Team

Editor-in-Chief

Dr. Amna Hassan, Visiting Professor & Post-Doctoral Fellow, Università Mediterranea di Reggio Calabria, Italy.

Contact: editor.sajlp@gmail.com.

Managing Editors

Dr. Kis Kelemen Bence, Senior Lecturer, Department of International and European Law, University of Pecs, Hungary.

Dr. Sabrina Hasan, Assistant Professor, Faculty of Law, East China University of Political Science and Law, China.

Dr. Phet Sengpunya, Founder & Managing Partner, Grandeur Law & Partner, Vientiane, Lao PDR.

Dr. Sams Uddin Ahmed, Professor, School of Law, BRAC University, Bangladesh.

Dr. Tugce Kilic, Policy and Advocacy Assistant, Transparency International, Berlin, Germany.

Dr. Muhammed Atiqur Rahman, Assistant Professor, School of Law, BRAC University, Bangladesh.

Dr. Mostafa Hosain, Assistant Professor, School of Law, BRAC University, Bangladesh.

Dr. Saru Arifin, Lecturer, Semarang State University, Semarang, Indonesia.

Dr. Kenneth Kaunda Kodiyo, Lecturer, Catholic University of Eastern Africa, Faculty of Law, Kenya.

Mr. Ragib Chowdhury, LLM (UBC), Lecturer, Department of Law, North South University, Bangladesh.

Management & Policy Chief

Dr. Upal Aditya Oikya, Assistant Professor, School of Law, BRAC University, Bangladesh, Email: aditya.oikya@gmail.com.

*** The **Editor-in-Chief** and the **Management & Policy Chief** are the main handling editors of SAJLP for ensuring its overall quality and best practices ***

Contents

Editorial Team ii

Foreword iv

Journal Overview vi

Description vi

Aims & Scope vi

Journal Metrics, Abstracting & Indexing vi

Open Access Statement vi

Professional & Ethical Guidelines vii

Copyright Statement viii

Privacy Statement ix

Editorial Policy x

Submission & Review Process x

Flow Chart of the Editorial Process: x

Authorship & Ethics xi

Post-Publication Issues xii

Appeals, Complaints & Misconduct xii

Expected Behavior xii

Submission Guidelines xiii

Article Types xiii

Manuscript Preparation xiii

Article Processing Fee (APC) xiv

Important Information for the Author xiv

Submission xiv

Contact xiv

E-waste Management: Bangladesh Perspective 1

Issues of International Crimes Tribunal Bangladesh: Legitimacy, Normativity and Legality 16

A Legal Study on Muslim Women's Guardianship and Custody Rights in Bangladesh 35

Ship Breaking in Bangladesh and Its Impact 43

The Legal Standpoint of SOLAS Convention for Maritime Safety and Security 49

Limited rights of the Borrowers in a Loan Recovery Process under the Money Loan Court Act (Artha Rin Adalat Ain) of Bangladesh 55

Foreword

This volume of the journal brings together a compelling set of articles and commentaries that highlight the intricate challenges and ongoing developments within various legal domains. From environmental protection and human rights to commercial law and constitutional safeguards, these contributions offer critical insights and stimulate further discourse on crucial contemporary issues.

Our first article addresses the burgeoning global concern of Electronic Waste (E-waste). It meticulously examines the dual nature of e-waste, posing both environmental and public health risks due to hazardous substances, while simultaneously offering economic benefits from precious metal recovery. The author specifically focuses on Bangladesh, a "Digital Bangladesh" aspiring nation facing a massive influx of e-waste, much of it informally recycled with severe environmental and human costs. The piece highlights the discrepancy between prohibiting international conventions (like the Basel Convention, 1989) and domestic laws, and the reality of widespread informal recycling, advocating for well-regulated formal sector operations.

Shifting to a historical yet profoundly relevant topic, another article delves into the legitimacy of the International Crimes Tribunal (ICT) of Bangladesh. It revisits the brutal realities of the 1971 Liberation War and the subsequent attempts to bring war criminals to justice. The author meticulously debunks accusations of bias and non-conformity with international standards, arguing for the legal and political legitimacy of the ICT's proceedings in addressing the atrocities committed during the war.

The subsequent article critically examines the position of women in Bangladesh within the framework of family laws. Despite constitutional guarantees of equal rights, traditional, social, and religious practices, coupled with separate personal laws governing family life, create significant gender inequality. The author specifically focuses on child custody and guardianship laws following separation or divorce, highlighting women's vulnerable position and arguing for the prioritization of the child's welfare doctrine over rigid personal laws, while also noting conflicts with CEDAW (Convention for the Elimination of All Forms of Discrimination against Women) provisions.

A compelling commentary in this volume addresses the complex and often hazardous industry of ship breaking in Bangladesh. The author outlines how flexible environmental laws and low labor costs have made Bangladesh a global hub for ship recycling, processing 52% of ships worldwide. However, this comes at a steep price: severe environmental pollution from hazardous materials and alarming human rights violations due to inhumane working conditions and frequent fatalities. The commentary calls for the government to enact eco-friendly laws, based on the Basel Convention, to ensure the industry's prosperity without compromising environmental and labor rights.

Another insightful commentary delves into the implications of the SOLAS Convention (International Convention for the Safety of Life at Sea) for mercantile ships. This piece elucidates the convention's imperative role in maintaining international standards for ship construction, navigation precautions, lifesaving equipment, and crew competence. It explores the critical roles of flag states and port state control in enforcing these standards, referencing the concept of 'no more favorable treatment' and drawing lessons from significant cases like 'The Estonia Accident'. The commentary also links Bangladesh's loading rules to the SOLAS Convention, emphasizing the importance of IMO guidelines for safe manning and life at sea.

Finally, the concluding article scrutinizes certain remedial provisions within Bangladesh's Artha Rin Adalat Ain 2003 (Financial Loan Court Act), specifically Sections 19 and 41, which govern loan recovery processes. The author argues that these provisions disproportionately burden borrowers with financial conditions—requiring deposits of 10% or 50% of the claim/decreetal amount to appeal or set aside *ex parte* decrees. This, the article contends, effectively deprives borrowers of their fundamental rights to approach the courts, as enshrined in Articles 27 and 31 of the Constitution of Bangladesh. The paper suggests factors for courts to consider to ensure justice for borrowers in loan recovery proceedings.

Collectively, these contributions underscore the dynamic and often challenging interplay between legal principles, socio-economic realities, and human rights. They urge us to critically assess existing legal frameworks, adapt to new challenges, and continually strive for a justice system that is robust, equitable, and responsive to the needs of all.

We extend our heartfelt gratitude to the peer reviewers of the current issue for their invaluable contributions. We invite independent thinkers, legal practitioners, jurists, economists, and aspiring students to see the SAJLP as a platform for their insightful publications. With the invaluable contributions, SAJLP strives to be a reliable and contemporary journal in the fields of social sciences, law, humanities, social policies, and related disciplines.

Journal Overview

Description

The South Asian Journal of Law & Policy (SAJLP) is a leading, open-access platform dedicated to fostering innovative socio-legal scholarship with a special focus on the South Asian region. As a non-profit, single-blind peer-reviewed journal, SAJLP provides a rigorous forum for independent thinkers, legal practitioners, jurists, economists, and promising students to share their groundbreaking research and thought-provoking insights. By embracing a diverse range of perspectives and cutting-edge methodologies, SAJLP aims to shape the future of law and policy in South Asia and beyond.

Aims & Scope

SAJLP is committed to publishing high-quality scholarly research that pushes the boundaries of knowledge in the fields of social sciences, law, humanities, public policies, and related disciplines. We welcome submissions of leading research articles, review articles, thematic discussions, case notes and analyses, and book reviews that address current and historical issues. Our editorial board is particularly interested in cutting-edge research that offers innovative solutions to pressing policy and legal challenges. We also provide a platform for thoughtful dialogue on contemporary global and socio-legal issues. We publish one volume each year, which includes both regular and special issues.

Journal Metrics, Abstracting & Indexing

The ISSN of the journal is 2616-8197 (https://portal.issn.org/resource/ISSN/2616-8197). SAJLP is indexed in HeinOnline, a prominent legal research database for a vast collection of legal materials; however looks forward to getting indexed in Web of Science and Scopus for wider international visibility to the scientific community. Being a signatory of DORA, SAJLP is committed to ensuring best practices by following the principles of DOAJ and COPE. With the commitment to open science and knowledge without borders, all the materials published by SAJLP are deposited in ZENODO, an OpenAIRE project, funded by CERN and the European Union.

Open Access Statement

SAJLP publishes certain issues and the articles contained therein in an open access (OA) format, subject to the terms of the Creative Commons Attribution-NonCommercial-ShareAlike 4.0 (CC-BY-NC-SA 4.0) license. The full issues of the journal are freely and unrestrictedly available on our website. Our journal provides "*gold open access*" to the articles, with immediate, time-free publication without embargo. Our authors can publish their work in our journal upon payment of a nominal publication fee, following the successful completion of the "*single-blind peer review*" process. The author's article can be freely downloaded and copied in electronic form; it can be used without alteration, with attribution to the source. The use of articles cannot serve commercial purposes; only the use of articles for one's own purposes is permitted. Our authors can freely

deposit their work in other (institutional or other) repositories without embargo - including the submission (Submitted version), accepted (Accepted version), and published (Published version) versions. SAJLP therefore fulfills DOAJ's definitions of open access.

Professional & Ethical Guidelines

We fully comply with the COPE Code of Conduct for best practices. The editors of SAJLP take the responsibility to ensure high-quality scientific publications that meet standards of academic excellence and to enforce a rigorous peer review together with strict ethical policies and standards in the field of scholarly publication. In case of an ethical issue, all requisite action is taken. Ethical issues that might be raised by readers of the journal will be examined by the editorial office following procedures in line with COPE guidelines. SAJLP abides by the COPE's "*Principles of Transparency and Best Practice in Scholarly Publishing*". For handling potentially unethical behavior by authors, reviewers, or editors, our journal adheres to COPE's policies. All editorial members at SAJLP are aware of COPE policies. The directions for authors of journals include information on ethical considerations for submitting manuscripts. The editorial staff will investigate any ethical concerns brought up by journal readers using the COPE-recommended processes. The Editorial Board can resolve disagreements over the reliability of research reported in articles that have been published. When appropriate, we will submit disagreements regarding authorship, data ownership, author misbehavior, etc., to external bodies. Authors are urged to address any claims that have been made against them with evidence. We adhere to COPE principles, notably "*How to recognize potential authorship problems*", when handling authorship disputes. Usually, the authorship can be altered via a correction if all authors agree. If not, we need a credible declaration concerning who is eligible for authorship from the institution(s) of the authors. The journal takes issues of copyright infringement, plagiarism, or other breaches of best practice in publication very seriously.

All parties involved in publishing with this journal must adhere to high standards of professional and ethical conduct.

The Editorial Board is responsible for the journal's content, overseeing the entire publication process from reviewing submitted studies and initiating peer review to evaluating feedback and performing necessary editorial tasks. They also retain the right to use plagiarism detection systems (Turnitin) to assess manuscripts. Notably, the board can reject a manuscript prior to peer review if it contains significant formal or substantive errors. The publication process and editorial decisions are strictly governed by applicable laws and regulations, with the Editorial Board upholding key principles. These include Fair Procedure, meaning editors assess manuscripts based solely on intellectual content, without regard to authors' personal characteristics such as race, gender, or political views. Confidentiality is paramount, requiring editorial staff to keep all information about submitted manuscripts private, not sharing details with unauthorized individuals. Finally, Disclosure and Conflict of Interest are crucial; editors must declare any conflicts of interest and ensure that materials awaiting publication or unpublished results are not used for personal research or publication activities by anyone involved in the process.

Reviewers for this journal, acting as independent and anonymous experts, are responsible for evaluating submitted manuscripts and recommending their acceptance or rejection, along with suggesting improvements. They must alert editors to any content overlap with other published works and maintain objectivity in their assessments, always supporting their statements with arguments. Confidentiality is crucial: reviewers must treat all manuscripts as privileged information, only citing results post-publication. They are also expected to disclose and avoid conflicts of interest and to recuse themselves if the manuscript falls outside their expertise or if a timely review is unfeasible, informing the Editor-in-Chief and proposing a new reviewer. While reviews are unpaid, certificates are available, and reviewer opinions significantly influence the final publication decision.

Authors must fully accept and adhere to the professional and ethical guidelines, as they bear the primary responsibility for compliance. They are obligated to accurately describe original research, ensuring their manuscripts facilitate critical discussion, meet all formatting requirements, and present data and results honestly with proper citation of all references. Any form of plagiarism is strictly unethical and unacceptable, requiring authors to guarantee their manuscript is entirely their own intellectual product and to cite and quote properly when using others' work. The journal employs automated means (Turnitin) to check all submitted manuscripts for originality. Multiple publications, meaning submitting the same text and content to various journals, are considered unethical. Authorship must be limited to those who have truly and significantly contributed to the study's conception, design, writing, or interpretation. The research leader or first author is responsible for ensuring all eligible co-authors are included and that the final version of the manuscript is reviewed and approved by all co-authors before acceptance. If authors discover significant errors or inaccuracies in a submitted or published manuscript, they must immediately notify the Editorial Board so that the Editor-in-Chief can facilitate corrections or the publication of a correction. Finally, authors are required to disclose all financial sources related to their research and any potential financial or other conflicts of interest that could influence the interpretation of their results.

Copyright Statement

The Editorial Board is committed to making submitted manuscripts publicly accessible (Open Access - OA) under clear copyright and licensing terms. In light of this, under the present terms, we provide authors with the opportunity for publication. By submitting the manuscript created by them to the Editorial Board and handing it over to the Editorial Office, the author consents to the publisher publishing an article edited from this manuscript in the journal.

The author acknowledges that the publishing and usage rights related to the article are realized according to the present terms after the first publication. The author consents to the publisher making the article freely accessible and downloadable on its official publishing website without any temporal restrictions. The exclusive right to the first publication of the article belongs solely to the publisher. The author accepts that the publisher publishes the article in such a manner that the usage rights of the article are governed by the Creative Commons Attribution-NonCommercial-ShareAlike 4.0 (CC-BY-NC-SA 4.0) license terms for any third party after the first publication.

Within the framework of this license, the publisher may convert the article into any electronic format and copy the article to a computer or electronic storage medium. The publisher may share the publication and usage rights of the article with any third party or exercise these rights jointly with any third party. The publisher may act on behalf of the author in cases of copyright infringement, unauthorized use, and actions that violate intellectual property rights related to the article. It may exercise all rights that the "CC BY NC SA 4.0" license terms enable for third parties.

With the submission, the author warrants that they are the exclusive author of the article along with the specified co-authors—or has the consent of all co-authors to publish the article in its current form—that the article is their own original intellectual creation, and that they have not partially or wholly transferred the first publication right of the article to a third party before submission. Based on these, the author has the right to publish the article and thus possesses all entitlements to authorize the publisher to publish the article for the first time or to exercise the usage rights related to the article according to the present terms.

The author warrants that the article does not contain plagiarism, that the descriptions are accurate and true to the best of the author's knowledge, and that the article does not contain defamation, obscene, or infringing on the copyrights, privacy, or any other rights of third parties, or otherwise violates the law, and that the manuscript is not under consideration or published, either partially or wholly, in any other language, in any other journal. The author acknowledges and accepts that if they wish to publish materials in their article whose usage rights are owned by other rights holders, publishers, or authors, it is solely their responsibility to obtain the appropriate publication and usage permissions from these rights holders before submitting their manuscript to the SAJLP authorities.

Privacy Statement

In the absence of the General Data Protection Regulation (GDPR) in Bangladesh, SAJLP will follow the principles of the GDPR Regulation of the European Union no. 2016/679. SAJLP processes personal data confidentially and takes all necessary security, technical, and organizational measures to ensure the security of the data. In certain cases, the processing, storage, and transmission of the provided data are mandatory bylaws, of which the publisher informs its clients separately.

The publisher does not verify the accuracy of the provided personal data. The accuracy of the provided personal data is the sole responsibility of the person providing it. We draw the attention of data providers to the fact that if they provide personal data that is not their own, the data provider is obliged to inform the data subject and, if necessary, obtain their consent. Also, the publisher selects and operates IT tools used for processing personal data in a way that ensures the processed data remains accessible to authorized persons and their integrity is maintained at all times. The publisher protects the data against unauthorized access, alteration, transmission, disclosure, deletion, or destruction, as well as against accidental destruction, with appropriate measures. The publisher ensures the security of data processing with technical and organizational measures that provide a level of protection commensurate with the risks associated with data processing. For further questions, requests, complaints, or incident reports, please contact the Management & Policy Chief at aditya.oikya@gmail.com.

Editorial Policy

Submission & Review Process

The journal considers all submissions based on topic, academic content, and style. The promising articles undergo *single-blind peer review* by experts in their respective fields, where the reviewers are aware of the identity of the authors, but the authors are unaware of the identity of the reviewers. Reviewers assess the article's scope, accuracy, structure, language, references, academic contribution, and ability to distinguish facts from opinions. The editorial board makes the final decision on publication. Therefore, authors must make requested revisions before publication. The journal accepts submissions previously presented at conferences or loaded on pre-print servers.

SAJLP operates under an *open-access continuous publication* model, ensuring that articles are made available online promptly after they have completed the production process. Each article receives a universal digital object identifier (DOI) and is deposited in ZENODO, an OpenAIRE project, funded by CERN and the European Union. SAJLP is indexed in HeinOnline, a prominent legal research database for a vast collection of legal materials; however, it looks forward to getting indexed in Web of Science and Scopus for wider international visibility to the scientific community.

For the editors and reviewers, their primary responsibilities include maintaining a steady flow of high-quality manuscripts, staying abreast of emerging trends in the field, upholding ethical standards, selecting and engaging the Editorial Board, contributing to strategic development, staying informed about global developments, identifying potential revenue sources, and promoting the journal to different networks. The editors must comply with the COPE's guide to ethical editing (https://publicationethics.org/files/A_Short_Guide_to_Ethical_Editing.pdf).

Flow Chart of the Editorial Process:

- **Pre-check**: After submission, the Editor-in-Chief will conduct a technical pre-check to evaluate the manuscript's suitability for the journal and its scope. This assessment will determine whether the manuscript adheres to high-quality research and ethical standards, as well as whether it meets the rigorous criteria required for further review. If the manuscript passes this preliminary evaluation, it will proceed to *single-blinded peer review*.
- **Peer Review**: The promising articles undergo *single-blind peer review* by experts in their respective fields, where the reviewers are aware of the identity of the authors, but the authors are unaware of the identity of the reviewers. The Editor-in-Chief will forward the article to the respective reviewer(s).
- **Editorial Decision and Revision**: The decision of the peer review will be one of the following:
    i. **Accept with Minor Revisions**: The paper is in principle accepted after revision based on the reviewer's comments. Authors are given five days for minor revisions.

ii. **Reconsider with Major Revisions**: The acceptance of the manuscript will depend on the revisions. The author is required to provide a detailed response to the reviewer's comments or provide a rebuttal if some comments cannot be addressed, within 20 days after receiving the feedback.

iii. **Reject and Encourage Resubmission**: In case of a vague conclusion/analysis, the paper will be rejected, and the authors will be encouraged to resubmit the paper once a precise conclusion through scientific analysis has been conducted.

iv. **Reject**: The article has serious flaws, and/or makes no original significant contribution. No offer of resubmission to the journal is provided.

- **Appeals**: Author(s) may appeal a rejection by sending an email to the Editor-in-Chief of the journal. The appeal must provide a detailed justification, including point-by-point responses to the reviewers' comments. The Editor-in-Chief will decide on this issue, upon getting advice from the Editorial Board members. A rejected decision at this stage is final and cannot be reversed.

- **Article Processing Fee**: Our efficient single-blind peer review system ensures a quick turnaround for your manuscript. If the authors' work receives positive feedback, SAJLP will notify the author of a nominal publication fee to secure its publication. This fee is payable within **ten (10) business days**. Upon receiving payment, the author will receive an acceptance certificate directly from the Editor-in-Chief (editor.sajlp@gmail.com). Please note that we prioritize transparency and avoid third-party involvement. SAJLP is the sole service provider for publication fees.

- **Financial Waiver**: We firmly believe that financial constraints should not impede the research journey. Authors experiencing financial hardship may apply for a waiver. To do so, please reach out to the Editor-in-Chief promptly after receiving your payment notification. To facilitate a smooth publication process, ensure that you submit your payment or waiver request within five (5) business days of receiving the payment notification. Failure to do this will result in the rejection of your manuscript due to non-payment.

- **Production and Publication**: Once accepted, the manuscript will undergo professional copy-editing, English editing, proofreading by the authors, final corrections, pagination, and publication on the journal website.

Authorship & Ethics

- Editorial board members can submit papers, but will be removed from editorial tasks for that paper to ensure fairness.

- Reviewers are expected to provide feedback on content, structure, figures/tables, formatting, and language.

- The journal encourages open data, structured methods, and open code for reproducibility.

- Authors are encouraged to register with ORCID for proper attribution.
- Authorship follows ICMJE guidelines, and all authors must meet those criteria.
- Conflict of interest(s), funding source(s), and ethical research details must be declared.
- The journal takes issues of copyright infringement, plagiarism, or other breaches of best practice in publication very seriously.

Post-Publication Issues

Corrections and retractions are managed following COPE guidelines. Authors review articles prior to publication to reduce content errors. Generally, post-publication changes are not allowed unless exceptional circumstances arise.

Appeals, Complaints & Misconduct

We take all appeals, complaints, and allegations of misconduct very seriously, irrespective of their source or the publication stage. We strictly follow COPE guidelines to resolve any issues that may arise. If you have an appeal, complaint, or misconduct concern, you must contact the *Management & Policy Chief* at aditya.oikya@gmail.com and include editor.sajlp@gmail.com in the CC field. Your concerns are important, and we are committed to addressing them promptly.

The **Editor-in-Chief** and the **Management & Policy Chief** are the main handling editors of SAJLP for ensuring its overall quality and best practices.

Expected Behavior

Abusive behavior towards staff, editors, authors, or reviewers is unacceptable and will lead to withdrawal of contributions and potential exclusion from future participation.

Submission Guidelines

Article Types

- **Research Paper**: Must not be more than 10,000 words, including tables, charts, diagrams, graphs, and references.
- **Review/Analysis/Article**: Must be between 3000 - 5,000 words, including tables, charts, diagrams, graphs, and references.
- **Thematic Discussion/Case Note/Commentary**: must be between 2000 - 3000 words.
- **Book Reviews**: The desirable length for book reviews is up to 2,000 words.
- **Conference Proceeding**: Conference proceedings may be published as a special issue; however, the review process will be the same as for any other article.

Manuscript Preparation

The author must prepare the manuscript in **MS Word format** (Font: Times New Roman, Size: 12, Line Spacing: 1.5, Format: docx). No PDF or LaTeX format will be accepted. The manuscript must include the following:

- **AUTHOR PAGE** - include the title, author's name, institutional email (preferred) or personal email, contact number, ORCID ID, academic degrees, current affiliations/professions with the details of their respective institution.
- **MAIN BODY** - include the title, abstract not exceeding 300 words, 4-6 keywords, introduction, research methodology, discussion, results, and a conclusion. **Chicago referencing** style is preferred. No "in-text" citation allowed; **use footnotes instead**.
- **BIBLIOGRAPHY** - include only the bibliography by maintaining the **Chicago referencing** style.
- **ACKNOWLEDGEMENTS** - This section must be included at the end of the bibliography, where you include all contributors who do not meet the criteria for authorship. Per ICMJE recommendations, it is best practice to obtain consent from non-author contributors whom you are acknowledging in your manuscript. If this section does not apply to your submission, you must still include the heading and state 'Not applicable' underneath.
- **STATEMENTS AND DECLARATIONS** - This section must be included after the 'Acknowledgements' section, where the author has to disclose the ethical consideration(s), including the usage of Artificial Intelligence, declaration of conflicting interest(s), funding statement, and data availability statement(s). If this section does not apply to your submission, you must still include the heading and state 'Not applicable' underneath.

Article Processing Fee (APC)

The Article Processing Charge (APC) for publishing within this journal is currently $300 (**in 2024*). This fee covers all publication costs, including the editorial process, web hosting, indexing, marketing, archiving, etc., and ensures that all of the content is fully open access. This approach maximizes the potential readership of publications and allows the journal to be run sustainably. Many institutions have funds available to support open-access publications; therefore, we ask the authors to contact their department and institutional library, along with their funding body (if applicable), to check whether open-access publication fees are available to them.

Waivers are also available for authors who can adequately demonstrate financial need. To avail of that waiver, please write a formal request to the Editor-in-Chief. For details, please check the "Flow Chart of the Editorial Process" section under the "Submission & Review Process" heading.

Important Information for the Author

The responsible editor will review the manuscript and decide whether it is acceptable for *single-blind peer review*. Manuscripts will be rejected immediately if the "manuscript preparation" is not followed. This decision usually takes 4–8 weeks from the receipt of the submission. The authors will be notified of this decision. By submitting the manuscript, the author complies with the copyright and privacy statements by the SAJLP authority.

Submission

Submit the manuscript in the required format (check the author guidelines) to editor.sajlp@gmail.com, with a cc to sajlp.repository@gmail.com.

Contact

- Principal Contact: Editorial Team, editor.sajlp@gmail.com.
- Support/Complain: Management & Policy Chief, aditya.oikya@gmail.com, with a cc to editor.sajlp@gmail.com.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

E-waste Management: Bangladesh Perspective

N. Nabila Hoque, Barrister-at-Law

Abstract

Electronic Waste (E-waste) is evolving form electronic goods containing both hazardous substance along with precious metals. The hazardous nature of e-waste is damaging public health and environment where as the precious metals obtained in the process is attracting economic benefits. The use of e-goods have increased higher standard of people's life and brought prosperity for the nation but at the same time created e-waste has directed problems at different levels. Developed countries produce huge amount of e-waste which they mostly export to the developing countries for their economic benefits. Complementing the vision of a digital Bangladesh the usage of electrical and electronic goods/technology has been rapidly accelerating. This is leading to creation of massive amount of e-waste that are being dumped in open landfills and water bodies instead of safe disposal. The purpose of this paper is to identify the challenges and law in the matters involving overall e-waste management of developing countries like Bangladesh. Meticulous desk based research has been done to accomplish the same. The Basel Convention, 1989 prohibits all trans-boundary movement of hazardous waste, Bangladesh is a signatory of the said convention. Bangladesh Import Policy Order and Hazardous Waste and Ship Breaking Waste Management Rules, prohibits importing any hazardous waste including e-waste nevertheless, in reality a large quantity of e-waste is imported and exists mostly in the informal in the country. However, there are no proper e-waste treatment facilities in the formal sector of the country, though electronic goods recycling and dismantling is a growing business in Bangladesh. Majority of the said recycling, for extraction of precious metals, is being carried out in the informal sector. The uncontrolled recycling process is very injurious to the environment and the people involved. The import and recycling of e-waste is undeniably important for the economy, even though with its precarious traits. The recycling should be done in the well regulated formal sector following proper safety measures. The e-waste, possess threat to both living organisms and the environment thus problem needs to be handled delicately with due diligence.

Introduction

Electronic waste (E-waste) is different from other wastes due to its hazardous nature. Anything that can no longer be used for its original purpose; is damaged or unsuitable for use; is leftover, unwanted, or a burden on its holder; is contaminated, and has a low or negative economic value etc. is considered as waste. The waste forms out of electrical and electronic devices is e-waste. E-waste arises out of at the end of life or any discarded item that has circuitry or electrical components with power or battery supply. E-waste includes all electrical and electronic equipment (EEE), components, subassemblies and consumables which are part of the product

© This work is licensed under CC BY-NC-SA 4.0

at the time of discarding[1]. EEEs converts to waste at the time and place when their structure and state are no more capable to provide the desired performance or may not be functional due to damage or its technology/design may no longer be state of the art or trendy. In simple terms, electronic products that have (i) become really un-serviceable, non-working condition, obsolete and unwanted by the user (ii) reached to the end of their useful life (iii) lost their functional as well as face value and (iv) discarded, at some time, by the owner or user are e-waste. EEE goods like CD players, VCRs, computers, mobile phones, monitors, printers, televisions etc. once discarded all amount to e-waste.

E-waste contains hazardous substance like mercury, lead, cadmium, arsenic, beryllium and brominated flame retardants, and produces toxins such as halogenated dioxins and furans which can damage public health and environment if not properly managed/treated. Along with hazardous substance e-waste also contains precious metal like copper, silver, gold, palladium and platinum etc. According to the Global e-Sustainability Initiative (GeSI), 320 Mt of gold and over 7,500 Mt of silver are now used annually to make PCs, mobile phones, tablets and other new electronic and electrical products globally. The economic value of the deposited metal in e-waste attracts the nations, for exporting/importing it. The improper recovery process of precious metal from e-waste, which usually happens in the developing country like Bangladesh, cause damage to public health and environment. Experts estimate metal deposits in e-waste to be up to 40 to 50 times more than are extracted from mines[2].

Being the great user of e-goods, developed countries produce huge volume of e-wastes which they mostly export to the developing countries every year; frequently violating the international law for their economic benefits. No doubt, re-use metal from e-wastes have increased higher standard of people's life and brought prosperity for the developing nation and at the same time e-waste directing problems at different levels. However, the sheer volume of e-waste is globally considered as hazards and problematic to the environment and mankind. Thus, dealing with e-waste, is a major concern for the policy makers at national and international level.

Objectives

The objectives of this paper are to: (i) have a general overview of e-waste (ii) identify the e-waste problems, and legal rules/policy level initiatives and (iii) suggestions for handling and managing used e-goods to cope with the existing situation. In order to meet the objectives the main research questions are:

[1]European Union Commission Directive (2002/96/EC)
[2] SM Abrar Aowsaf. 'Treasure from Trash: E-waste Recycling in Bangladesh". Dhaka Tribute' *Dhaka Tribute (online)* (15 February 2018) <https://www.dhakatribune.com/opinion/special/2018/02/15/ treasure-trash-e-waste-recycling-bangladesh> accessed 2 September 2018.

© This work is licensed under CC BY-NC-SA 4.0

What is e-waste? The problems and damages it caused to the public health and environment.

What are the impacts of e-waste on socio-economic factor and environment of developing countries like Bangladesh?

How e-waste is managed/treated/handled in the country like Bangladesh?

What are the national and international laws/rules to regulate and managed e-waste?

Efforts has been made to find answers of the questions along with concluding remarks include recommendations for appropriate legal initiative in managing and handling e-waste to get rid of its harmful effect to public health and environment of Bangladesh.

Methodology

The paper is directed to managing and handling of e-waste in Bangladesh and improving efficiency of management functions i.e. e-waste treatment in the community. Thus, attempts have been made to describe the concept and nature of e-waste with legal rules, existing management capacity, facilities, and treatment practices in line laws/policies at national and global levels. Comprehensive desk-based research has been done on the basis of facts. To accomplish this paper, the global as well as Bangladesh's scenario of e-waste have been evaluated rationally and necessary data/information has been collected from national and international rules and regulations. The facts relating to the national policies on managing e-waste in the formal and informal sector has taken as the basis of foundation of this paper.

Scenario of E-Waste

This is the 21st century; the global information society is growing at great speed. Faster networks and new applications have brought new opportunities to many people, particularly in the areas of health, education, government, entertainment, and commerce. Increased levels of disposable income, urbanization, and industrialization in many developing countries are leading to growing amounts of EEE, and consequently to e-waste. The price of IT equipment, such as computers, TVs, laptops and mobile handsets etc. are dropping. Lower prices in developing regions are the result of manufacturers' efforts to offer increasingly affordable entry-level EEE for low income users. Thus, very often many EEE devices become e-waste after short termed usage. According to Global E-Waste Monitor 2017, the amount of E-waste produced is expected to grow to 52.2 million metric tons in 2021, with an annual growth rate of 3 to 4 percent[3]. This immense volume of e-waste produced globally requires global awareness regarding the consequence of its impact to environment and hence, and proper

[3] Cornelis P. Balde, Vanessa Forti, Vanessa Gray, Ruediger Kuehr, Paul Stegmann, 'The Global E-waste Monitor 2017: Quantities, Flows and Resources' (2017) *United Nations University, International Telecommunication Union, and International Solid Waste Association* https://www.itu.int/en/ITU-D/Climate-Change/Pages/Global-E-waste-Monitor 2017.aspx accessed 2 September 2018 2018

© This work is licensed under CC BY-NC-SA 4.0

treatment in a legal way to reclaim valuable materials and safe managing of toxic materials in order to protect lives, harvest and environment.

The Forecast of electronic waste generated worldwide from 2010 to 2018, predicted that in 2018, 49.8 million metric tons of e-waste will be produced globally[4]. The majority of e-waste generated around the world are from small electronic equipment. The quantities of e-waste will increase in the future, as more countries agree on free trade, tariffs removed, cell phone and household appliance usage penetrates the rural markets worldwide. The World Trade organization's initiative to remove trade tariff will increase more usage of electronic product. In Bangladesh, during the year 2017 electrical machinery & equipment, excluding computers, worth of approximately $3.5 billion was imported which was 7.5 percent of the country's total import[5].

Problem of E-waste

Undoubtedly, development and use of e-goods is in the best interest of higher standard of living and increased prosperity for the nations. At the same time, in the development and usage procedure of e-goods have been creating wastes as well as directed problems at different levels[6]. Like all developing countries Bangladesh is also progressing towards digitalization with an aim to fulfil the vision of a "Digital Bangladesh". Thus, usage of electronic and electrical goods founding on information communication technology is rapidly growing. Along with increased usage of electronic goods comes the burden of e-waste which if not properly processed will adversely affect the environment and everything in it.

E-waste is a combination of precious, earthly and harmful metals which can be reclaimed in through recycling process, thus making it both extremely toxic and high in economic value. Silver, gold, palladium, copper and platinum are few of the precious metal and lead, mercury and chromium are harmful elements present in electronics. In processing e-waste generates the pollution present in environment[7] and constitutes a long term effect involving vulnerable group and generation to come. It is recognised that workers involved in e-waste processing suffers from tuberculosis, blood disease, anomalies in the immune system, lung cancer,

[4] Statista, *Forecast of electronic waste generated worldwide from 2010 to 2018 (in million metric tons)*(2018)https://www.statista.com/statistics/499891/projection-ewaste-generation-worldwide/ accessed 2 September 2018

[5] Export.Gov, *Bangladesh - Prohibited & Restricted Import* (23 October 2017) https://www.export.gov/article?id=Bangladesh-Prohibited-Restricted-Imports accessed 2 September 2018

[6] Round Table, 'E-Waste Management: Challenges for Bangladesh' *The Daily Star* (Online), 29 August 2015 https://www.thedailystar.net/round-tables/challenges-bangladesh-134470 accessed 2 September 2018

[7] Liu Q, Cao J, Li KQ, Miao XH, Li G, Fan FY, Zhao YC, 'Chromosomal aberrations and DNA damage in human populations exposed to the processing of electronic waste' (2009) *Environmental Science and Pollution Research, Vol. 16, No. 3.*

© This work is licensed under CC BY-NC-SA 4.0

malfunctioning of kidney and respiratory system[8] and their future generation face birth defects, infant mortality and under development of brain in children[9].

Managing E-waste

Management of e-waste is critical as it poses many risks on human and environment. Therefore, developed countries tend to export their e-waste exports to the developing countries where it is burnt for scrap. E-waste is processed to reclaim valuable metals on it for economic benefits. In this reality the treatment process of e-waste warrants the following stages[10]:

Handling: it is the primary/initial e-waste action which can be accomplished through either the traditional way or recycling.

Dumping: is one of the most common methods of disposal. Being hazardous e-waste pollutes the entire vicinity and virtually, everyone and everything exposed to the dangerous chemicals, toxic pollutants are at risk. Dumping situation in Bangladesh are at its worst.

Recycling: e-waste is complex and difficult to recycle. Improper recycling process in the informal sector is a common scenario.

The e-waste recycling sector in developing counties like Bangladesh is largely unregulated. The practices used in developing countries often exacerbate pollution by creating hazardous chemicals and additional pollution. The workers in the recycle informal sector are dominated by the urban poor with very low literacy levels they lack the skill, knowledge and equipment to dismantle, recycle and dispose electrical waste in an environmentally prudent manner. Hence everything is dismantled and handled manually without any protective gear and very little awareness of the potential hazards[11]. An additionally hazardous practice such as open burning and acid treatment is used for further processing of electronic waste. All kinds of electronic waste, which cannot be resold in the second hand market, are collected and then they are sent to different places around the city for dismantling and recycling processes.

These e-waste workers are exposed to hazards leading physical injuries and chronic ailments such as asthma, skin diseases, eye irritations and stomach disease. The dusts and the surrounding ambient air may pose inhalation hazard along with dermal exposure hazard to workers as well as the risk of environmental contamination. In Bangladesh about 50.000

[8]Oyuna *Tsydenova and* Magnus *Bengtsson* 'Chemical hazards associated with treatment of waste electrical and electronic equipment' (2011) *Waste Management, Vol. 31, No. 1.*

[9]Siddhart Prakash and Andreas Manhart, 'Socio-economic assessment and feasibility study on sustainable e-waste management in Ghana' (August 2010) https://www.oeko.de/oekodoc/1057/2010-105-en.pdf accessed 2 September 2018

[10] Round Table, 'E-Waste Management: Challenges for Bangladesh' *The Daily Star* (Online), 29 August 2015 https://www.thedailystar.net/round-tables/challenges-bangladesh-134470 accessed 2 September 2018

[11]

© This work is licensed under CC BY-NC-SA 4.0

children are involved in e-waste processing sector; 15 percent child workers die during and after effect of e-waste processing; and 83 percent people become sick and live with long term illness[12]. Child workers are more vulnerable to the hazards of e-waste e.g. falling objects, chemicals, abusive employers along with many other social problems related to human survival in such harsh environment.

Legal Aspects

The legal rules relating to e-waste is composed of international and regional conventions like The Basel Convention, EU regulations respectively along with national legislations. The Basel Convention attempts to: (i) reduce hazardous waste generation at source; (ii) promote and ensure environmental sound management (ESM) of hazardous waste; (iii) promote the proximity principle, advocating disposal as close to the source as possible; and (iv) regulate and monitor the remaining trans-boundary movements of hazardous waste[13]. The Convention is not against the hazardous waste trading but it imposes some trade restrictions on those hazardous materials that are deemed to require trans-boundary movement. Bangladesh is a signatory; and also has accessed to the Basel convention in April 01, 1993.

The positions of Bangladesh on hazardous wastes under Basel Convention are follows[14]:

In the Bangladesh Environment Conservation Act, 1997, hazardous waste has been defined.

Bangladesh has banned import of all sorts of waste in the Import Policy Order.

In 1996, Bangladesh has prepared the 'Regulatory Framework on Import of Hazardous and Toxic materials' through a project funded by ADB.

Bangladesh organized training programmers on 'Toxic Chemicals and Hazardous Waste' and 'Risk Assessment and Management'.

A draft position paper on use of toxic chemicals and disposal of toxic and hazardous wastes in Bangladesh has also been prepared, which is under process of finalization by national expert team.

Bangladesh has drafted a National Chemical Profile.

The Ministry of Environment and Forest (MoEF) published a manual and other material for the management of Medical Waste.

The MoEF also developed draft Medical Waste Management Handling Rules, which is going to be approved.

---

[12]Environnent and Social Development Organization-ESDO, *Study on E-waste: Bangladesh Situation*, (2010), ESDO, Dhaka, Bangladesh.
[13]Basel Convention 1989.
[14] Mohammad Moinuddin Abdullah, 'Bangladesh Country Position on Basel Convention' (Prepared for Regional Workshop on Prevention of Illegal Transboundary Movement for Hazardous Waste, Beijing, People's Republic of China, 28-29 March 2007)

© This work is licensed under CC BY-NC-SA 4.0

A model has been developed titled "Medical Waste Management through Public Private Partnership Model", under which MoEF provided a training to the Medical Waste Management and Segregation to the medical professionals (Doctor, Nurse, Cleaner, Ward boy) of the public, private and clinics in both Dhaka and Rajshahi City

According to the Import Policy Order, importing used EE goods are prohibited in Bangladesh, but in reality a large quantity of e-waste exits in the informal sector. EEE goods recycling and dismantling is a growing business in Bangladesh where e-waste dismantling facility is not available in the formal sector[15]. E-waste recycling process in Bangladesh is very injurious and hazardous for which there is no specific guideline or regulation. Presently, the country's e-waste/hazardous waste activities including production, import/export and recycling etc. are being carried out under the provision of (i) Bangladesh Environment Conservation Act 2010, (ii) Chemical Substance Depleting Ozone Layer (Control) Policy 2004, (iii) Sound Pollution Policy 2006, (v) Bangladesh Environment Conservation Policy 2010, (iv) Hazardous Waste and Ship Breaking Waste Management Policy 2011, (vii) Bangladesh Bio-safety Rules 2012, and (viii) Import Policy Order, (ix) National Environment policy 1992, and (x) The Environmental Conservation Rules 1997, and The Environmental Court Act 2000.

There is a need for Bangladesh to legislate e-waste and the Government of Bangladesh is in the process of adopting E-waste (Management and Handling) Rules. The rules will secure the below mentioned parameters in terms of e-waste management:

define their responsibilities for applicable to producer, dealers, collection centres, refurbisher, dismantler, recyclers, auctioneers, consumers involved in manufacture, sale, purchase and processing EEE or components;

describe the grant of authorisation, power to suspend or cancel an authorization;

procedure for registration, environmental clearance and renewal;

procedure for transportation and storage of e-waste;

accident reports and follow-up; and

segregation, dismantling, recycling and disposal of e-waste.

Hazardous waste includes e-waste persist in the environment and cause harmful effects to human health and environment hence, it is of great concern of the plan and planning of Bangladesh. The Government of Bangladesh in its National Strategy for Accelerated Poverty Reduction Paper stressed on increasing expenditure for hazardous waste management, elevated

[15]Nahian Nabila Hoque, 'Managing E-waste in Reducing Vulnerability and Enhancing Resilience: The Case of Bangladesh' (Paper presented at the 3rd World Congress on Disaster Management at Visakhapatnam, India 6th-10th November, 2017).

© This work is licensed under CC BY-NC-SA 4.0

segregation at source and safe disposal of hazardous waste[16]. While the 7th Five Year Plan recognized and growing demand for electrical & electronic devices has led to growing e-waste and emphasized on the urgent need of enacting e-waste rules and preparing guidelines based on a baseline survey[17].

Recommendations

Managing e-waste is multi-faceted challenge and Bangladesh has been heat of e-waste, due to the illegal exports, weak rules and legislative approach. Even though resolving the overall impact of the e-waste challenge cannot be accomplished by a single country nevertheless, the specific tasks may help Bangladesh to combat its e-waste problem:

The informal sector should be provided with proper financial incentive, training and guidance so that they develop the skill, knowledge and equipment to dismantle, recycle and dispose electrical waste in an environmentally sound manner.

The MoEF should take up the responsibility for monitoring and may examining the environmental conditions and the effectiveness of both formal and informal e-waste recycle plants.

The local city corporation can play a vital role by separating the e-waste from the general waste at its initial collection point.

To improve the e-waste recycling practices, incentive package may be offered to those complying with environmental and health norms.

The producers of electronic goods can be burdened with the duty to produce more eco-friendly and easy to recycle products.

Civil Society of the country may promote green consumerism and community awareness on household waste segregation.

The schools can have a separate awareness programs so that children from an young age are aware of the side effect of e-waste and are encouraged to your ecofriendly products.

Bangladesh may plan to develop regulations for handling e-waste, ensure proper monitoring the e-waste activities, and regulate importing of e-waste.

Bangladesh may strongly oppose any used electronics donation or support from the developing and deny to the said manner of e-waste transfer.

[16]Government of Bangladesh, 'Steps Towards Change: National Strategy for Accelerated Poverty Reduction II (Revised)' (2009) *Planning Commission, Dhaka; Bangladesh*
[17]Government of Bangladesh 'The 7th Five Year Plan' (2017) *Planning Commission, Dhaka; Bangladesh.*

© This work is licensed under CC BY-NC-SA 4.0

A simple version of the MoEF can conducted unannounced examinations of the recycle plants and evaluate the level of compliance with the regulations. Plants that are compliant with the law may be issued certificates and plants that do not comply with the law may be penalized.

Heavy tax may imposed on importing EE goods that are not eco-friendly, difficult to recycle, are more harmful for the environment to decrease the demand and discourage consumers from purchasing.

Undertaking research and development for innovating technology in national perspective and application of modern technology in handling and managing e-waste for income generation activities of poor people and benefiting national economy.

Conclusion

Even though all goods electronic or not will at one point become obsolete, undesirable or waste, e-waste is hazardous in nature thus, has a greater negative effect on the environment and the living organisms. This makes handling, management and recycling of e-waste both difficult and vital. The developed countries produce the maximum amount of e-waste in order to escape from their strict regulatory burdens of recycling it they export the waste to developing nations like Bangladesh for their own economic benefit.

Trans-boundary movement i.e. illegal export and access of e-waste in Bangladesh is common phenomenon. Nevertheless, imposing restrictions and banning trans-boundary movement of e-waste will not economic decision for a country like Bangladesh, rather it will difficult and costly to implement. Such a step might destroy the potential source of cost effective raw material, employment and income opportunity of the vulnerable poor whose main source of income might be dependent on e-waste related activities.

In all this it is important to not lose sight from the fact that e-waste indeed has a detrimental impact which is not limited to any local or national boundary. In this era of modern technology the global usage and dependency on electronics is beaming and will continue doing so therefore, producing more e-waste. It is high time that Bangladesh identifies this disease named e-waste and develops long term solutions, to enact and adapt fair policy regulation dedicated to keep the environment safe for its citizens.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

© This work is licensed under CC BY-NC-SA 4.0

Bibliography

Alejandra Sepulveda, 'A review of the environmental fate and effects of hazardous substances released from from electrical and electronic equipment during the recycling: Examples from China and India' (2010), in *Environmental Impact Assessment Review, Vol. 30, No. 11*

Algemene Rekenkamer, *Coordinated audit on the enforcement of the European waste Shipment Regulation-Joint report based on eight national audits (2013),* <http://www.eca.europa.eu/sites/cc/Lists/CCDocuments/other%20publications/Coordinated_audit_on_the-enforcement_of-the-European-Waste-Shipment-Regulation.pdf> accessed 2 September 2018 2018.

Anwesha Borthakur, Pardeep Singh, 'Electronic waste in India: Problems and policies' (2012) *International Journal of Environmental Sciences, vol. 3 No. 1, 2012*.

Bangladesh Bio-Safety Rules 2012

Bangladesh Environment Conservation Act 2010

Bangladesh Environment Conservation Policy 2010

Bangladesh Environnent Protection Act 2010

Bangladesh Hazardous Waste and Ship Breaking Waste Management Policy 2011

Bangladesh Import Policy Ordre 2015-2018

Bangladesh National Environnent Policy 1992

Bangladesh Sound Pollution Policy 2006

Basel Convention 1989

Bradley L. Gerrett, 'E-Waste in Developing Countries Endangers Environment, Locals' *USNEWS* (USA), 2014.

Chanathip Pharino, 'Challenges for Sustainable Solid Waste Management: Lessons from Thailand' (2017) *Springer*

Chemical Substance Depleting Ozone Layer (Control) Policy 2004.

Cornelis P. Balde, Vanessa Forti, Vanessa Gray, Ruediger Kuehr, Paul Stegmann, 'The Global E-waste Monitor 2017: Quantities, Flows and Resources' (2017) *United Nations University, International Telecommunication Union, and International Solid Waste Association* https://www.itu.int/en/ITU-D/Climate-Change/Pages/Global-E-waste-Monitor 2017.aspx accessed 2 September 2018 2018.

Director General, Environment 'Guidance on the Interpretation of Key Provisions of Directive 2008/98/EC on Waste' (2006).

Dr. David W.J. Green, *Managing Hazardous Wastes (Financed by the Asian Development Bank Technical Assistance Funding Program)*(December 2010)

© This work is licensed under CC BY-NC-SA 4.0

<https://www.adb.org/sites/default/files/project-document/62157/38401-01-reg-tacr-02.pdf> accessed 2 September 2018

E Marketer, *2 billion Consumers Worldwide to Get Smart (phones) by 2016* (2014) http://www.emarketer.com/Article/2-Billion-Consumers-Worldwide-Smartphones-by-2016/1011694#sthash.0CGanVps.pdf accessed 2 September 2018.

E.M. Medalla and D.C. Lazaro, 'Does the lead to a race to the bottom in environmental standards? Another look at the issues' (2005) *Discussion Paper Series No. 2005-23* <www3.pids.gov.ph/ris/dps/pidsdps0523.pdf> accessed 2 September 2018

Editorial, 'E-Waste Management', *The Independent* (online), 19 April 2018 http://www.theindependentbd.com/arcprint/details/146352/2018-04-19 accessed 2 September 2018.

Electronics Redux, *What is E-waste?* (2011) <http://www.bostonelectronicwaste.com/> accessed 2 September 2018.

Environmental Conservation Rules 1997 of Bangladesh.

Environmental Court Act 2000 of Bangladesh.

Environnent and Social Development Organization-ESDO, *Illegal import and trade off of e-waste in Bangladesh*, (2012), ESDO, Dhaka, Bangladesh.

Environnent and Social Development Organization-ESDO, *Study on E-waste: Bangladesh Situation*, (2010), ESDO, Dhaka, Bangladesh.

European Union Commission Directive (2002/96/EC)

Eva Pongrácz, Jenni Ylä-Mella, Riitta Liisa Keiski and P. Tanskanen 'Proceedings of the 23rd international conference on solid waste technology and management', (Philadelphia, PA; March 30- April 2, 2008), *Journal of Solid Waste Technology and Management, Dept. of Civil Engineering, Widener University, Vol 16, No. Chapter 3-C, No.18*

Export.Gov, *Bangladesh - Prohibited & Restricted Import* (23 October 2017) https://www.export.gov/article?id=Bangladesh-Prohibited-Restricted-Imports accessed 2 September 2018

Gentry S. Bradford, 'Environnemental Regulation in Europe: Hazardous Waste and Contaminated Sites' (1990) *North Western Journal of International Law & Business, Vol. 10, Issue 3 Winter, 1990.*

Government of Bangladesh 'The 7th Five Year Plan' (2017) *Planning Commission, Dhaka; Bangladesh.*

Government of Bangladesh, 'Steps Towards Change: National Strategy for Accelerated Poverty Reduction II (Revised)' (2009) *Planning Commission, Dhaka; Bangladesh*.

© This work is licensed under CC BY-NC-SA 4.0

Green Peace, 'Campaign Reports' (2015) http://www.greenpeace.org/international/en/campaigns/detox/electronics/the-e-waste-problem/where-does-e-waste-end-up accessed 2 September 2018.

International Programme on the Elimination of Child Labor (IPEC), Children in hazardous work: What we Know, what we need to do (Geneva, ILO) (2011) http://www.ilo.org/ipecinfo/product/viewProduct.do?productID=17035 accessed 2 September 2018.

Jef Huisman, 'Eco-efficiency evaluation of WEEE take-back systems' (2012) *Waste Electrical and Electronic Equipment (WEEE) Herdbook, 93-119*.

Joerg Koepp, *End to end tests are essential for matching application behavior to network if IT is to succeed* (2016) http://www.newelectronics.co.uk/electronics-technology/end-to-end-tests-are-essential-for-matching-application-behaviour-to-network-if-iot-is-to-succeed/114053/ accessed 2 September 2018

Josh Lepawsky and Chris McNabb 'Mapping international flows of electronic waste' (2010) *in Canadian Geographer, Vol. 54, No 2.*

K. M. Bahauddin and M. H. Uddin, *Prospect of Solid Waste Situation and An Approach of Environmental Management Measure (EMM) Model for Sustainable Solid Waste Management: Case Study of Dhaka City (2012)* https://www.banglajol.info/index.php/JESNR/article/viewFile/11601/8492 accessed 2 September 2018.

Karin Lundgren, 'The Global Impact of e-waste: Addressing the challenge', (2012) *International Labour Office, Programme of Safety and Health at Work and the Environnent, Sectoral Activites Department, Geneva, ILO.*

Kristof Geeraerts, Andrea Ille and Jean-Pierre Schweizer, 'Illegal shipment of e-waste from the EU: A case study on illegal e-waste export from the EU to China' (2015) *A study compiled as part of the EFFACE project. London: IEEP*.

Lieselot Bisschop, 'Is it all going to waste? Illegal transports of e-waste in a European trade hub' (2012) *Crime, Law and Social Change, 58(3), 221–249.*

Liu Q, Cao J, Li KQ, Miao XH, Li G, Fan FY, Zhao YC, 'Chromosomal aberrations and DNA damage in human populations exposed to the processing of electronic waste' (2009) *Environmental Science and Pollution Research, Vol. 16, No. 3.*

Mahbub Alam and Khalid Md. Bahauddin, *Electronic Waste in Bangladesh: Evaluating the Situation, Legislation and Policy and Way Forward With Strategy and Approach* (11 July 2015) https://content.sciendo.com/view/journals/pesd/9/1/article-p81.xml accessed 2 September 2018.

Mohammad Moinuddin Abdullah, 'Bangladesh Country Position on Basel Convention' (Prepared for Regional Workshop on Prevention of Illegal Transboundary Movement for Hazardous Waste, Beijing, People's Republic of China, 28-29 March 2007).

© This work is licensed under CC BY-NC-SA 4.0

Nahian Nabila Hoque, 'Managing E-waste in Reducing Vulnerability and Enhancing Resilience: The Case of Bangladesh' (Paper presented at the 3rd World Congress on Disaster Management at Visakhapatnam, India 6th-10th November, 2017).

Nordbrand, M. C. Scruggs, *Out of control: E-waste trade flows from the EU to developing countries* (2010) http://www.swedwatch.org/en/reports/e-waste-export-out-control accessed 2 September 2018.

Oyuna Tsydenova and Magnus Bengtsson 'Chemical hazards associated with treatment of waste electrical and electronic equipment' (2011) *Waste Management, Vol. 31, No. 1.*

Planet Green Recycle, 'E-Waste Crisis' (2018) http://planetgreenrecycle.com/fundraising/e-waste-problem accessed 2 September 2018.

Rashad Ahamad 'E-wastes, a threat to public health', The New Age Bangladesh (online). 12 October 2017 <http://www.newagebd.net/article/25979/e-wastes-a-threat-to-public-health> accessed 2 September 2018.

Rashna Raya Rahman and Naureen Shafinaz Mahboob 'Electronic Waste: The story of Bangladesh', *The Daily Star (online)*, 05 August 2015 https://www.thedailystar.net/op-ed/politics/electronic-waste-the-story-bangladesh-121792 accessed 2 September 2018.

Round Table, 'E-Waste Management: Challenges for Bangladesh' *The Daily Star* (Online), 29 August 2015 https://www.thedailystar.net/round-tables/challenges-bangladesh-134470 accessed 2 September 2018.

Sheikh Iraj, 'Recycling E-Waste', *The Independent (online)*, 27 October 2017 http://www.theindependentbd.com/printversion/details/120764 accessed 2 September 2018.

Siddhart Prakash and Andreas Manhart, 'Socio-economic assessment and feasibility study on sustainable e-waste management in Ghana' (August 2010) https://www.oeko.de/oekodoc/1057/2010-105-en.pdf accessed 2 September 2018.

SM Abrar Aowsaf. 'Treasure from Trash: E-waste Recycling in Bangladesh". Dhaka Tribute' *Dhaka Tribute (online)* (15 February 2018) <https://www.dhakatribune.com/opinion/special/2018/02/15/ treasure-trash-e-waste-recycling-bangladesh> accessed 2 September 2018.

Statista, *Forecast of electronic waste generated worldwide from 2010 to 2018 (in million metric tons)*(2018)https://www.statista.com/statistics/499891/projection-ewaste-generation-worldwide/ accessed 2 September 2018.

Swedish Environmental Protection Agency, 'WEEE Directive in Sweden Evaluation with future study' (2009) http://www.naturvardseverket.se/Documents/publikationer/978-91-620-8421-9,pdf accessed 2 September 2018.

Ted Smith, David A. Sonnenfeld, David Naguib Pellow and Jim Hightower , *Challenging the chip: Labor rights and environmental justice in the global electronics industry (*Philadelphia, PA, Temple University Press).

© This work is licensed under CC BY-NC-SA 4.0

Umesh Kumar and D. N. Singh 'E-Waste Management through Regulations' (September 2013) *International Journal of Engineering Inventions, Vol. 3, Issue 2.*

UNB Dhaka 'UNIDO to help Bangladesh manage e-waste', *The Daily Star* (online), 06 September 2017 <https://www.thedailystar.net/city/unido-help-bangladesh-manage-e-waste-1458346> accessed 2 September 2018.

United Nations Sustainable Development Programme, *Transforming the World: the 2030 Agenda of Sustainable Development* (2015) https://sustainabledevelopment.un.org/post2015/transformingourworld accessed 2 September 2018.

V. Kalra, *E-waste in India: System failure imminent: Take action now* (2004) http://www.toxicslink.org./pub-view.php?pubnum=40 accessed 2 September 2018.

Waste Electrical and Electronic Equipment Directive (2002/96/EC) 2002.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

Issues of International Crimes Tribunal Bangladesh: Legitimacy, Normativity and Legality

Mr. Muhtasim Fahmid and Ms. Bushra Haque, University of Dhaka

Abstract

The liberation war of Bangladesh was a bloody and visceral ordeal, claiming more than three million lives and laying waste to the infrastructure of the country in an abysmal level. The oppressive nature of the West Pakistan government, and their open dismay about the Bengali population led to the massive popular uprising in what would become Bangladesh. Millions of lives were lost in the war that followed, along with some of the most notorious breaches of international law and the Geneva Convention. After liberation, the government of Bangladesh made attempts to bring the perpetrators of war crimes to justice, but the attempts were not fulfilled. The process was restarted in 2009, garnering both positive and negative reviews from different stakeholders. There were questions about the standard of the trials and the conformity with international norms and legislations. The main goal of this essay shall be to prove the legitimacy – both legally and politically, of the International Crimes Tribunal of Bangladesh, and to debunk the accusations regarding the Tribunal, especially its accused violation of International Standards, and the complaint about being politically biased.

Introduction

The liberation war of Bangladesh saw a populist militia fighting against a trained military force. The victory that was achieved by the liberation forces is extremely impressive, given that there were only nine months of warfare. However, the Pakistani military forces partook in war crimes and crimes against humanity in a notorious ratio. As of today, the death toll has been estimated to above three million in civilian deaths, about 30,000 in combat deaths and about 400,000 rapes and sexual assaults among other atrocities.[18] This was committed within a span of only nine months.

In 1973, the first government of sovereign Bangladesh enacted the International Crimes Tribunal Act, 1973 to authorize the investigation and prosecution of the persons responsible for genocide, crimes against humanity, war crimes and other crimes under international law committed in 1971[19]. The Act was supposed to bring both the Pakistan Armed Forces officers and the Bangladeshi collaborators (Razakar, Al-Badr, Al-Shams) to justice for perpetrated crimes against humanity.

[18] Saikia, Yasmin (2011). Elizabeth D. Heineman, ed. Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights. University of Pennsylvania Press. p. 157. ISBN 978-0-8122-4318-5.

[19] Advocate Zead-Al-Malum's Speech before South Asian Committee of EU Parliament Archived 28 January 2013 at the Wayback Machine., Meeting on Bangladesh:" Exchange of Views on War Crimes Trials and on Accountability Issues," 31 January 2012.

© This work is licensed under CC BY-NC-SA 4.0

However, the then-current political scenario of the world and Bangladesh's relatively weak position in the International Community, combined with Pakistan's political maneuvering and influencing, had left little chance for the grieving nation to bring the criminals to justice. A short while after, there was a drastic political dynamic shift in Bangladesh, beginning with the assassination of the founding father of the nation, Sheikh Mujibur Rahman and culminating in military rule. In fact, the war criminals were given a chance to come back to politics during the military regime. These events had created a very complex scenario within which the enactment of an International Crimes Tribunal was rather difficult.

It was not before 2009 that the newly elected Awami League government, as per their election mandate,[20] enacted an International Crimes Tribunal (hereinafter referred to as ICT) to bring the crimes to humanity to justice. During the establishment of the Tribunal, although the government had overwhelming public support, there were a few detractors to the Tribunal. As with any War Crimes Tribunal enacted before in the modern judicial history, there arose a question of fair trial and the maintenance of a certain international standard in the trials.

As stated in the abstract, this paper aims to show that the International Crimes Tribunal is indeed a justified tribunal and in no way is based on *mala fide* intentions to politically target the opposing parties. Empirical research has been used in this paper.

Historical Background

After the partition in 1947, the Indian subcontinent was divided into two nations conforming to the Lahore Proposal. The Muslim-majority country of Pakistan had two wings separated by a thousand miles with India in between. There were very little similarities between them except religion. The government of Pakistan was led mostly by military-backed dictators since 1958. The rulers was very biased and unfair towards the Bengali population.[21] The protests against these inequalities started concerning the rights for language. In 1948, the Founder of Pakistan, Muhammad Ali Jinnah declared Urdu to be the sole official language of Pakistan, looking over Bengali. Bengali was the language of the majority of Pakistani citizens, residing in East Pakistan. The dissent among the people of East Pakistan culminated in a movement for language in 1952. The protests for language rights led to a series of political protests, which were put down by force each time, sometimes with the use of violence. Within this period of time, Pakistan fell into military rule and subsequently, dictatorship.

In 1970, after a mass protest and civil revolution, Dictator Yahya Khan decided to allow democratic elections. The elections were won by Sheikh Mujibur Rahman and his party, Awami League, by a landslide. The powers-that-be at West Pakistan had constitutional debates over the division of powers between the central government and the provinces. However, these

[20] Kibria, Nazli (2011). *Muslims in Motion: Islam and National Identity in the Bangladeshi Diaspora*. Rutgers University Press. p. 19. ISBN 978-0813550565.
[21] W. Van Schendel, 2009. *A History of Bangladesh.* Cambridge: Cambridge University Press. pp.110-111; G. Robertson, 2015. *Report on the International Crimes Tribunal of Bangladesh,* Sarajevo: International Forum for Democracy and Human Rights. p.18.

© This work is licensed under CC BY-NC-SA 4.0

talks failed to reach a conclusion and the national assemblies were suspended on 1st March, 1971, causing severe dissent.[22]

On 25th March, 1971 the Pakistani Army assaulted the general population and civilian infrastructures and thus began a notorious series of genocide, rapes and destruction. The liberation forces of Bangladesh fought valiantly against the Pakistan Army, and soon it took an international dimension both tactically and geo-politically.[23] As Pakistan had USA and China in its support, the newly-sovereign (As of the declaration of Independence on 25th March) Bangladesh gained the direct support of India and the indirect support of USSR.[24] On 3rd December, 1971 India declared war on Pakistan. After two weeks of war, Pakistan surrendered without conditions on the eve of 16th December.

After the liberation of the country from the Pakistani Armed Forces, the newly-appointed government of Bangladesh passed an Act named the Collaborators Act, 1972[25]. This was enacted to apprehend the collaborators who did not side with the nationalist cause, and perpetrated various crimes during the war. However, the Act had many shortcomings. Thus, in 1973 the government passed another act, which was called the International Crimes Tribunal Act, 1973.

When in Bangladesh the parliament enacted the International Crimes (Tribunals) Act of 1973 but it was to be some time before any tribunals were set up.

After 25 years of the enactment of ICT act 1973 the Rome Statute was formed. The Rome Statute of the International Criminal Court (often referred to as the International Criminal Court Statute or the Rome Statute) is the treaty that established the International Criminal Court (ICC).

While the International Crimes (Tribunals) Act 1973 may have been largely based on international standards at the time of its drafting, international criminal law and its practice have evolved significantly in the last two decades. The trials in the international criminal tribunal for Yugoslavia (ICTY) and international criminal tribunal for Rwanda (ICTR), that have created important standards, yielded significant jurisprudence, and provided valuable experience in handling complex cases that should be taken into account to ensure conformity with international standard are done in tribunals set up by ICC years later after the ICT act 1973 was enacted. The precedents set by these tribunals were adopted in essence by the later amendments of the Act. Bangladesh took pride to enact an act to meet the end of justice long before definitions of War Crimes/Genocide/Crimes against Humanity was defined & internationally recognized.

---

[22] Van Schendel, Willem (2009). A History of Bangladesh. Cambridge University Press. p. 298. ISBN 9780521861748.

[23] Richard Nixon's administration had ample knowledge about the genocide going on in Bangladesh and chose to ignore it. The goal of the USA was to curtail increasing Soviet influence in South Asia and at the same time, use Pakistan as a buffer to improve relations with PR China. For more information, see Harris, Ralph (17 December 1971). "Nixon and Pakistan: An Unpopular Alliance". The Miami News. Miami, Florida, US. Reuters

[24] Swarajya Magazine, "December 1971: When The US Sent Its Naval Ships Into Bay Of Bengal, And USSR Responded"

[25] Bangladesh Collaborators (Special Tribunal) Order 1972

© This work is licensed under CC BY-NC-SA 4.0

The Act: Its Jurisdiction and Amendments

The Act was created in order to primarily bring the 195 Pakistani officers who were held as Prisoners-of-war in India, for acts of genocide and other crimes against humanity.[26] In order to lend the act constitutional validity, the first amendment of the constitution declared that any law to try war criminals would not be unlawful or unconstitutional.[27]

The initial Act of 1973 was focused towards the punishment of the military officials of the Pakistani Armed forces, as it can be seen in section 3:

"A Tribunal shall have the power to try and punish any individual or group of individuals, or any member of any armed, defense or auxiliary forces, irrespective of his nationality, who commits or has committed, in the territory of Bangladesh, whether before or after the commencement of this Act, any of the crimes mentioned in sub-section (2)".[28]

However, due to various political and diplomatic scenarios, there were no tribunals enacted during that period of time. After the assassination of Sheikh Mujibur Rahman and the following martial law regime, there was little discussion in the country about the trials of war crimes. It was not until the return of democracy to the country in 1991 that the talks about the war crimes resurfaced[29]. The first real steps towards the apprehension of war crimes began when Awami League got elected in 2008. The steps included the amendment of the Act in 2009, and the International Crimes Tribunal Rules of Procedure and Evidence were put in place by 2010.[30] The amended Act broadened the horizon of justice, allowing *in absentia* verdicts.[31] Also, most importantly, the amendments "Provided that a political party that had worked against the liberation of Bangladesh could be tried on the same charges as individuals. They also authorized the government to file appeals with the Appellate Division if the tribunal ruled for acquittal for a suspect."[32] As per the International Bar Association, the "1973 Legislation, together with the 2009 amending text, provides a system which is broadly compatible with current international standards."[33] The tribunal has the jurisdiction to try and punish for the crimes of for 'crimes against humanity', 'crimes against peace', 'genocide', 'war crimes', 'violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva

[26] War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates, Ridwanul Hoque, Australian Journal of Asian Law, 2016, Vol. 17 No 1, Article 5: 1-19
[27] The Constitution (First Amendment) Act 1973
[28] The International Crimes (Tribunals) Act, 1973 (ACT NO. XIX OF 1973) (unamended).
[29] Ahmed, Imtiaz (2009) Historicizing 1971 Genocide: State Versus Person. Dhaka: University Press Limited., giving an account of a few individual attempts to prosecute some perpetrators.
[30] The International Crimes (Tribunals) (Amendment) Act, 2009.
[31] The International Crimes (Tribunals) Act, 1973 (ACT NO. XIX OF 1973) (amended); S.10A
[32] The International Crimes (Tribunals) Act, 1973 (ACT NO. XIX OF 1973) (amended); S.3, S.21(2)
[33] Amir-Ul Islam, M. (2012). Morten Bergsmo; Cheah Wui Ling, eds. Old Evidence and Core International Crimes. Torkel Opsahl. p. 254. ISBN 978-82-93081-60-9.

© This work is licensed under CC BY-NC-SA 4.0

Conventions of 1949', and 'any other crimes under international law'.[34] The concept of 'Universal Jurisdiction' and 'Individual Responsibility' has been affirmed various times.[35]

While the tribunal lays down the basic procedures for trial and procedure, one of its defining acts is the allowance of irregular applications of evidence and procedure. Most definitively, the Tribunal is lenient on the matters of evidence and procedure, keeping in consideration the scenarios at play. Mere verbal evidence or testimonies provided years after the events actually took place may prove sufficient.[36] Also, the Tribunal is free to adopt[37] its own procedures, allowing evidence all reports, photographs, films and other materials having probative value.[38] This is necessary, considering the fact that, due to the amount of damage to life and properties during the war and the subsequent adverse situations in sovereign Bangladesh, there remains little scope for justice if the procedures of Evidence Act, 1872 or the Criminal Procedure Code, 1898 were to be used.

The ICT Act also distinguishes itself concerning rape. Following the precedent set by the ICTR, the Act has recognized rape as a part of genocide and a crime against humanity. The logic behind this is genocidal rape is not a by-product of the conflict, but the pre-planned strategy to demoralize the opponents and break their spirit. This can be affirmed by the various statements given by the Pakistani officers during the war. It has been stated that 'The rapes were so systematic and pervasive that they had to be conscious Army policy, "planned by the West Pakistanis in a deliberate effort to create a new race" or to dilute Bengali nationalism'.[39] The Act has promptly recognized this in Article 3(a), stating rape as 'Crimes against Humanity'. Also, Article 3(c) describes genocide. 3(c)(ii) defines genocide as 'causing serious bodily or mental harm to members of the group', and 3(c)(iii) states 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part'.[40]

One of the biggest shortcomings of the 1973 Act was the legal gap of non-protection of the victims and the measure of any kind of witness protection. One of the most important pillars of fair trials is the assurance of safety of the victims and witnesses from any retaliatory actions. The 2010 amendments enacted have resolved this gap. The tribunals are now allowed to 'pass necessary orders directing the concerned authorities of the government to ensure protection, privacy and wellbeing of the witnesses or victims'.[41]

---

[34] ICT Act 1973 s 3(2) (a) to (f). These crimes are defined in s 3(2) of the Act. On 10 July 2009, the Act was amended to include rape within the list of 'crimes against humanity'. It is important to note that 'crimes against humanity' were recognized as international crimes in the Charter of the Nuremberg Tribunal, and in the United Nations General Assembly Resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946.

[35] On individual responsibility for mass atrocities, see, among others, Jain, 2013, who proposes a doctrine of perpetration that reflects the role and function of high level participants in mass atrocity.

[36] ICT Act 1973, s 23.

[37] ICT Act 1973, s 22. See the International Crimes Tribunal Rules of Procedure 2010 (15 July 2010) (as amended on October 28, 2010 and on June 28, 2011).

[38] See ICT Act 1973, s 19.

[39] Brownmiller, Susan (1975). Against Our Will: Men, Women and Rape, Ballantine

[40] The International Crimes (Tribunals) (Amendment) Act, 2009, Section 3(a)

[41] Rule 58A (inserted in 2011). See also Rule 14 that enjoins the Prosecutor and the Investigation Agency to take necessary measures to ensure the confidentiality of any information and the protection of any witness or victim.

© This work is licensed under CC BY-NC-SA 4.0

Initially, there were various offers of assistance from the international community with the legislation. Jamaat had brought up several complaints against the tribunal and accused it to be politically biased.[42] However, as the first indictments were passed, there was a growing concern from select organizations that the Tribunal was not maintaining International Standards.[43]

The prosecution stood at a disadvantageous position due to the provisions of Section 21(2) of the amended act, which allowed the government to have the right to appeal only in the case of an acquittal. When the verdict of *The Government of the People's Republic of Bangladesh v Abdul Quader Molla (2013)* was published, the common mass arose in a public protest which led to a further amendment in 2013.[44] This allowed the government to appeal against any verdict given by the Tribunal, acquittal or else.

The Question of Legitimacy: The political background regarding war crime trials

As the genocide and the war crimes are well-proven, the most important issue regarding the International Crimes Tribunal is the geo-political scenario and the different stakeholders and their agendas.

The common people of Bangladesh have, in some essence, always wanted some form of justice for the war crimes[45] committed during the liberation war. The motive behind this is pretty straightforward- almost every family in the country have lost a person, had loved ones tortured or lost valuable properties at the hands of the Pakistani Armed Forces and their collaborators. The dissenting voices against the tribunal have tried to raise an issue that there are more pressing issues in the country regarding development and job sectors than enacting justice for a war that had taken place almost five decades ago.[46] However, the majority of the population have always been in the fervent support of the tribunals.

If a political legitimacy of the trial of crimes against humanity is sought here, the biggest proof for it would be two things- firstly, the unprecedented student and youth support seen in the Shahbag movement, and secondly, an almost unanimous media support of the tribunals.[47]

After the verdict of *Molla*,[48] the whole nation was disappointed when the HCD did not give a death sentence. The crimes of Abdul Quader Molla, the accused, were so infamous and well-documented that it could only be compared to the likes of Adolf Eichmann[49] or Radovan

[42] Haq, M. Zahurul (5 August 2011). "Correspondents' Reports, Bangladesh: Case against Delwar Hossain Sayedee". In Schmitt, M.N.; Arimatsu, Louise; McCormack, T. Yearbook of International Humanitarian Law – 2010 (1st ed.). Springer. p. 463. ISBN 978-90-6704-811-8.
[43] "Bangladesh: Government Backtracks on Rights". Retrieved 1 February 2013.
[44] International Crimes (Tribunals) (Amendment) Act, 2013 (Act No. III of 2013) (with effect from 14th July, 2009).
[45] Iftekairul Alim. Recorded Interview, 16.05.2015, Mymensingh; Mofidul Hoque. Recorded Interview, 13.05.2015, Dhaka
[46] Anon. Senior Professor. Recorded Interview, 17.05.2015
[47] Rahman, Mashiur (28 February 2013). "Analysis: Calls grow for banning Jamaat-e-Islami in BD". The Express Tribune.
[48] The Government of the People's Republic of Bangladesh v Abdul Quader Molla (2013) 3 LNJ (AD) (2014) 121
[49] THE EICHMANN CASE 36 Intl. L. Rep. 5 (Israel, Dist. Ct. Jerusalem 1961)

© This work is licensed under CC BY-NC-SA 4.0

Karadzic[50]. In response to this, several activists began a protest at Shahbag, Dhaka in February 5, 2013 which quickly became a massive people's protest. The protestors, mostly youth with participation from all strata of the society, demanded the capital punishment for Molla, and no quarters to be given towards the others who were indicted. Following the protest, the 2013 amendment was made to the Act giving the government power to appeal against any sentences deemed alleviated. The Shahbag movement proved beyond a doubt that the Bangladeshi people, as a whole wanted justice for the war crimes. What made it more impressive was the fact that most of the protestors had been fervent in the support of the movement despite various attempts to mislead and mislabel it as an anti-Islamist movement. In fact, while the movement was taking place there was an extensive misinformation campaign[51] [52] run by Islamist parties combined with violent protest by Jamaat's student wing, Islami Chatra Shibir[53] [54]. Also, the only media outlets who had dissenting opinions about the Tribunal were sponsored by Jamaat or inclined to the Islamist politics in some sort. One of the media outlets, *Amar Desh*, had continuously misrepresented both the Tribunal's agendas and the Shahbag protests, contributing to create civil unrest and religious tensions[55]. It seemed like the efforts would have sidetracked the general potrayals of the jusice process creating a severe misunderstanding amongst the people.[56] This had continued[57] until its Chief Editor, Mahmudur Rahman was arrested and charged with sedition and contempt of court[58].

Also, the media of Bangladesh, which has been very much vocal on any wrongs made by the government and supportive of the partisan politics, were almost unanimous in the support of the Tribunal. It goes without saying that portraying the whole justice process as an act against Islamist parties would create a severe situation amongst the people, most of whom are Muslims. This would certainly work in the favor of the indicted persons.

It was evident that, despite attempts to veer the interests of the common masses in other directions, it has stayed fervent on the support of the International Crimes Tribunals.

The Question of Normativity: Previous War Crimes Tribunals and International Law

The basic question while considering an International Crimes Tribunal's legitimacy and justification is whether it is *ultra vires* of customary International Law or not. To tackle this

[50] ICTY, The Prosecutor v. Radovan Karadzic, IT-95-5/18-T
[51] There was an extensive misinformation campaign about the Shahbag protestors, or *Ganajagaran Mancha* stating that they were composed of atheists and blasphemes wanting to derogate the Muslim community and enact "secular", "anti-Islamist" policies.
[52] "Shibir man behind blogger killing". The Daily Star. 2 March 2013.
[53] "Jamaat attacks cops in Jessore". The Daily Star. 4 January 2013.
[54] "Six cops injured in Jamaat attack at Pirojpur". New Age. 8 December 2012.
[55] "Protesters vow to resist anti-lib forces". The New Nation. 24 February 2013.
[56] "Shahbag stolen? Third force dynamics and electoral politics in Bangladesh," Anupam Debashis Roy, Howard University, Washington DC, USA
[57] The goal of the dissenting media outlets was to demean the Shahbag movement by creating an image of the movement as a secularist-driven, anti-Islamist movement trying to get rid of Islamist politics in Bangladesh. This was not the case, in fact the Shahbag movement as a whole had nothing to do about Islamist politics. Their focus was on the war crimes and Jamaat, which was the party mainly concerned with the tribunal. There had never been an agenda to get rid of the Islamist politics.
[58] "Bangladeshi editor sentenced for contempt". The New Statesman. 20 August 2010

© This work is licensed under CC BY-NC-SA 4.0

question regarding the ICT-BD, one has to consider the Geneva Convention, previous tribunals and other important statutes.

There has been sincere debates about how the approach towards war crimes should be taken. It has been argued by some scholars that a legitimate and thorough trial of the war crimes indeed have a positive effect on democracy[59], not to mention it is a duty to prosecute such crimes per IHL and customary international law.

Perhaps the most important piece of legislation regarding the trial of war crimes is the Rome Statue, which made Genocide a crime under the *jus cogens* principles in the International Law, while establishing the International Criminal Court at Hague. The ICC has been instrumental in the subsequent efforts to try war criminals and other crimes against humanity. The Rome Statute has broadened the array of evidence and procedures regarding these tribunals. It can be seen that, the ICT-BD has followed the Norms of the Rome Statute and has aspired to the standards of the ICC. Although the Rome Statute is the main law regarding genocides, one has to consider the previous iterations of War Crimes Tribunal. These consist, most famously, the Nuremberg trials.

The Nuremberg Trials, which was created to punish the crimes constituted during WW2, has established some norms regarding this kind of trials. ICT-BD has a distinct connection to Nuremberg, both in the essence and in practice. It follows and expands upon the trial in the matters of rights of the accused, fair trials and retrospective trials.[60]

Also, the Tokyo tribunals[61], the Nanking Tribunals and the International Criminal Tribunal for former Yugoslavia (ICTY) are some of the most renowned tribunals regarding war crimes. A comparison between these tribunals and the ICT-BD shows that the ICT-BD has been modeled after these tribunals. While it has domesticated the International Law to its own standards, it values the principles of fair trial, use of unconventional evidence and procedures, while taking into context the various scenarios regarding a conflict. Although the retrospective nature of ICT-BD has been questioned, each of the mentioned tribunals has been *post-facto* in nature. The ICT-BD follows the precedents set up by the tribunals of Yugoslavia and also, the International Crimes Tribunal for Rwanda (ICTR). Whereas the number of judges in these tribunals (ICTY and ICTR both allow up to 16 permanent and varying number of *ad item* judges whereas ICT-BD allows up to five) vary, the basic tenets of fair trial and rule of law are maintained in all of them. One of the reasons behind the differences of the tribunals is that, both the ICTY and the ICTR were established by UN Security Council Resolution no. 827, whereas the ICT-BD was a domestic approach.

One of the points that the ICT-BD lags behind is the 'concurrent jurisdiction' doctrine of the ICTR, allowing International law make as much of an impact as the domestic laws. The ICT-BD, due to following a dualist approach as is the norm of the Bangladeshi judiciary, significantly lags in this point.

---

[59] Sanoj Rajan, Domestication of International Criminal Law: International Crimes Tribunal of Bangladesh, A Case Study, 12 ISIL Y.B. Int'l Human. & Refugee L. 132 (2012-2013)
[60] Nuremberg Revisited, The Daily Star, September 20, 2013
[61] International Military Tribunal for the Far East.

© This work is licensed under CC BY-NC-SA 4.0

Although there have been various concerns and complaints about the legitimacy and standards of the International Crimes Tribunals, and some have accused it being a political agenda to eliminate rivals. But while the question of 'International Standard' has been brought up again and again, one has to wonder, what does the precedents tell about the international approach towards crimes against humanity?

Since the Armenian Genocide committed by Turkey in the early 1900's, the world came to realize the type of crime that is genocide, or ethnic cleansing. The trials of the Nazi war criminals in the Nuremberg Tribunals had seen to justice. But except the Nuremberg trials, there are very few instances of crimes against humanity getting properly tried. The Geneva Convention was enacted in 1949, to 'protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight'[62]. Although a massive portion of the International Community (196 countries) were party to the convention, this did not stop them from violating it repeatedly and commencing crimes against humanity. Some examples would be the genocide of Bengalis in 1971, the murder of 800,000 Rwandans in 1990, the genocide of 2 million Cambodians by the Khmer Rouge, the Bosnian massacre, the crimes committed during the 2003 Iraq invasion etc. These are just a few in the midst of many crimes against humanity.

After the establishment of the Rome Statute in 1998, there have been retrospective attempts to bring the perpetrators of genocide to justice. For instance, the Khmer Genocide of Cambodia was committed at the same era as Bangladesh, and the ECCC was established retrospectively in 2006, with the help of the UN. However, the Cambodian judiciary had failed to address various important aspects of fair trials, such as the lack of judicial independence, a limited jurisdiction, and insufficient legal protections.[63] Similarly, the IHT (Iraqi High Tribunal) was also created to address the war crimes regarding the 2003 multi-national campaign against the Baath regime. However, the trials were far from fair. Saddam Hussein was denied legal counsel for over a year, and he stood trial with almost no defense. The IHT had allowed the use of evidence obtained under torture[64], which itself is a severe violation of human rights.

The regrettable thing is this, although it is very much evident that the ICT-BD has excelled in the matters of maintaining fair trials, even moreso when compared to other tribunals, it has been repeatedly labelled sub-par by various organizations. These organizations, as observed by Casaca (2018), are the same ones who remained silent during the commencement of war crimes in Iraq, or the trials in Cambodia. It is a fallacy by certain parts of the international community to accuse Bangladesh of holding a politically motivated trial, whereas it is clear from factual evidence that Bangladesh have exceeded the standards of various other tribunals, many of which were created with the help of the United Nations and the International Criminal Court

[62] ICRC, 2010, para. 1
[63] Crimes against Humanity: An assessment of Bangladesh's response in a comparative perspective; the cases of Cambodia and Iraq, Paolo Casaca and Susan Guarda, SADF Working Paper, 2018, Issue No. 1
[64] Human Rights Watch, 2004/12/16

© This work is licensed under CC BY-NC-SA 4.0

themselves. The ICT has fared better amongst the contemporary Tribunals, namely the ECCC and the IHT.[65]

The Question of Delay: The Simla Pact, the Delhi Agreement and Recent Complicacies

Before anyone is to ask why the road to justice was so long for Bangladesh, one has to look at the imminent political scenario of the newborn nation and the world after the liberation in 1971. The unfortunate series of events that took place shortly after the birth of the young nation put the trial proceedings in jeopardy. Right after the liberation of Bangladesh, the country was in uncharted grounds in the International Community. Due to the Cold War being at its height at the time, the United States of America poised against the birth of Bangladesh, and it backed its political ally Pakistan. Also, due to Pakistan's status as the-then largest Muslim nation in the world and its influence amongst the Middle Eastern nations made sure that most of the Muslim nations did not recognize Bangladesh as a sovereign nation. However, Bangladesh immediately launched efforts to bring the 195 Pakistani officers kept as POWs to trial. India expressed assistance in this effort[66].

Pakistan brought charges against India in the International Court of Justice (ICJ) in 1973 whilst India was attempting to hand the POWs over to Bangladesh. In a veil of ostensibility Pakistan claimed that it had jurisdiction over the trial of the POWs. In reality, this was an attempt to deny Bangladesh the chance to try the perpetrators of war crimes.[67] In the following period of time, the Simla agreement and the Delhi agreement were signed between India, Pakistan and Bangladesh (the conditions of the latter[68] have not yet been fulfilled by Pakistan). These treaties ratified the exchange of prisoners to take place between India and Pakistan. Pakistan used the interned Bengali civilians and army officers as a pawn to get the 195 officers free from India, promising retaliation upon them if they saw any efforts to try the war crimes.[69] This ultimately forced the government to concentrate its efforts on the local collaborators. However, due to

[65] Crimes against Humanity: An assessment of Bangladesh's response in a comparative perspective; the cases of Cambodia and Iraq, Paolo Casaca and Susan Guarda, SADF Working Paper, 2018, Issue No. 1

[66] The then government decided to try those members of the Pakistani army who had surrendered, reportedly around 82,000 in total, on charges of international crimes. Bangladesh then narrowed down the number to some 1,100 for the purposes of trial. Following a further investigation, however, and following the pressure from India to try those against whom specific evidence of most serious crimes was available, a decision was made to put on trial 195 perpetrators against whom strong and, in some cases, direct and undisputed proof of war crimes was available.

[67] Case Concerning the Trial of Pakistani Prisoners of War (Pakistan v India; 11 May 1973), [1973] ICJ Reports 347 (Pakistan argued that only it had jurisdiction to try suspects of genocide under arts VI and IX of the Genocide Convention).

[68] Although there is no entrenching obligation created during the 1974 Agreement, the promise of the Pakistani administration is binding. Read with international laws such as CPPCG and the Rome Statute, it is evident that Pakistan has a responsibility to try the accused officers.

[69] In May, 1973 the Pakistani Prime Minister Bhutto made a statement as follows: "We ... cannot ... consent to trials of prisoners of war in Bangladesh. It would cause revulsion here and we have to react accordingly [...]." Referring to Sheikh Mujibur Rahman's attempt to try the war criminals, he further announced that "[i]t is now purely up to Mujibur Rahman. [...] If he proceeds on his mad venture, it will be the single biggest cause of instability in the subcontinent."

© This work is licensed under CC BY-NC-SA 4.0

some flaws in the justice system[70], and a desire to let all Bangladeshis be a part of the nation-building procedure, a general amnesty was declared in 1973. This did not apply to serious war crimes, however – only releasing those held under the Collaborators Act of 1972. (Reza, 2008)[71]

As it happened, Bangladesh required the recognition from Pakistan and a seat at the United Nations Assembly as a newly-born nation; the country also needed the recognition and support of the Muslim countries. Thus, for the betterment of the nation the notion of justice was sacrificed and the officers of the Pakistan Armed Forces were repatriated in 1974. Shortly after, the founder of the nation was assassinated, the 1972 order was repealed and it was a long period of time before anyone could restart the trial talks.

When the Tribunals were constituted in 2009, one of the complaints came up stating the amount of delay between the crimes and the apparent trials, and the legality of holding such trials. Some also quoted the amnesty given in 1973. To rebut these claims, some points need to be cleared:

Firstly, the 'blanket' amnesty of 1973 did not exonerate anyone from serious offenses, or crimes against humanity such as genocide, rapes or others. It was specifically designed for collaboration offenses. Although some of these crimes were indeed committed by collaborators, which remains a murky point in the legislation. But the crimes against humanity, stated in section 3 of the ICT Act were in no way exonerated.

The reasoning behind the amnesty provided by Sheikh Mujibur Rahman is explained above. It was a diplomatic decision, taken by politicians thinking about the greater good of the country. However, the stark distinction here is, the repealed Collaborators Order of 1972 did not constitute the trials for crimes against humanity, only for collaboration crimes. Further, just because the Pakistani POWs were exonerated does not necessarily mean that the duty or right to try the local collaborators had been absolved by the government of Bangladesh. It has to be remembered that, the collaboration offences were accounted as minor and petty offences in a conflict zone. However, the genocidal crimes cannot be put in the same category as these crimes, and amnesty or impunity cannot be claimed under the Collaborators Order.

It is also to be noted that, International Law puts a duty to try and punish such severe crimes even if the domestic laws fail to do it,[72] and scholars argue that it is a duty of states to try these crimes based on Geneva Convention and CIL.[73]

---

[70] (Linton, 2010: 205), "Reports suggest some 73 special tribunals were set up to try the collaborators in line with domestic criminal law but there is little credible information about charges, trials, convictions or acquittals of collaborators under the 1972 Order." Cited from Hoque, 2016.

[71] War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates, Ridwanul Hoque, Australian Journal of Asian Law, 2016, Vol. 17 No 1, Article 5: 1-19

[72] See the principles of international law as recognised in the Charter of the Military Tribunal (Nuremburg Tribunal) of 1945, and in the 1950 judgment of the Tribunal. For a useful analysis of the legal position in this regard, see generally Obura, 2011, who argues that existing law does, in fact, impose a legal duty on states to prosecute and punish atrocious crimes, thus dispelling claims that international law fails to expressly oblige states to prosecute and punish international crime.

[73] Paust and Blaustein, 1878: 27 ('a refusal to prosecute can be a violation of international obligations under the [Geneva] Conventions [...] to bring to trial all persons alleged to have committed or ordered to have committed

© This work is licensed under CC BY-NC-SA 4.0

Secondly, the perpetrators of the war crimes have been living on borrowed time. It was made very clear after the Simla Agreement (which Bangladesh was not a party of) that, 'The issue of the POWs and other matters concerning Bangladesh would be kept pending' (Hossain, 2013:218)."[74]

As per Pakistan's ostensible claim in the ICJ in 1973, it has taken the burden of justice upon itself to try and punish the 195 Pakistani officers, according to prevailing international norms, including the United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG) (the Genocide Convention).[75] However, it is a matter of pity that Pakistan backtracked from their promise made in the Delhi Agreement, and the justice of the Armed Forces officers still are undone.

Thirdly, the ICT has made it clear in the case *Chief Prosecutor versus M Sakhawat Hossain & 7 others,*[76]that, any delay in the justice of the war crimes are not *ipso facto* a ground to doubt the truth or justification of the prosecution. It also has said that the clemency provided in the 1974 Delhi agreement does not match the legislation on which the tribunal is based. It has further provided that the mere failure of successive governments to take upon the justice of war crimes is not a ground to question or challenge its justifications.

It can be derived from these points, that there were a number of complex scenarios at play which halted the immediate prosecution of the war criminals. However, there is no ground to say that this delay makes the trials illegal. The trial proceedings are by both International and domestic laws, justified.

The Legal Issues: Fair Trial, International Standards, Important Cases and Verdicts

The concept of fair trial is an important pillar of International Law and the right to a free and fair trial is one of the most necessary things in a criminal justice system that aspires to follow the rule of law. It is a doctrine accepted both in the Universal Declaration of Human Rights (UDHR), 1948[77] and the International Covenant on Civil and Political Rights 1966 (ICPRR), both very important legislations concerning international law with the latter having almost

"grave breaches [...] of the Conventions', [...]. .... No state can absolve itself or any other state or entity of any liability incurred by itself or by another in respect of breaches of the 1949 Geneva Conventions by express recognition of the universal nature of the offenses [under those Conventions]' – emphasis added). Also see art 2(3) of the International Covenant on Civil and Political Rights 1966, by which every State Party has an obligation to provide for an effective remedy for violations of human rights. As Islam, 2009 argues, the Bangladeshi Government is 'specifically' mandated under the law to initiate this historic trial. Cited from Hoque, 2016.

[74] War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates, Ridwanul Hoque, Australian Journal of Asian Law, 2016, Vol. 17 No 1, Article 5: 1-19

[75] War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates, Ridwanul Hoque, Australian Journal of Asian Law, 2016, Vol. 17 No 1, Article 5: 1-19

[76] Chief Prosecutor versus M Sakhawat Hossain & 7 others, ICT-BD [ICT-1] Case No.04 OF 2015 (p.16). (Issues no. v, viii, ix & xi)

[77] Adopted by the UN General Assembly on 10 December, 1948 (GA Res 217A (III), UN Doc A/810). Article 10 of the UDHR provides that '[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him'.

© This work is licensed under CC BY-NC-SA 4.0

universal ratification.[78] Fair trial is an important part of customary international law and all the war crimes tribunals have faced the issue to keep fairness for the war criminals. Previous War Crimes Tribunals, namely the International Crimes Tribunal for the Former Yugoslavia (ICTY) has portrayed measures(concurrent to article 14 of the ICCPR) to ensure that the trial chamber provide fair trial.[79]

Considering the scenario of Bangladesh, the Rome Statute of the International Criminal Court 1998 is of utmost importance, specifically its declaration of fair trial. The Rome statute strikes a balance between providing fair trial for the accused, and the protection of the victims. While it recognizes the accused's right to be silent, to an appeal and even to challenge the jurisdiction of the court,[80] it allows the identities of the victims of sexual crimes to be concealed and the source of evidence to be withheld.[81] The Rome statute has a broader recognition of what fair trial should be than the ICPRR. In the context of regional wars and crimes committed in them, it is important to realize that there is no universal yardstick to measure fairness, and the same standard cannot be expect from various scenarios. It can be context-specific. Thus, it has been said in the ICTY that, fairness does not equate to, or does not require, perfection.[82]

Some significant changes have been brought in the Act, by way of amendment, in 2009 and thereafter. To come out from the culture of impunity the government, for the purpose of section 3 of the Act, by notification in official gazette has set up the Tribunal. The tribunal consists of three Judges of whom one is Chairman and two are members. Under section 6 of the Act the government may, by notification in the official gazette, set up one or more tribunals each consisting of a Chairman and not less than two and not more than four other Members.

On 22/3/2012 government by official gazette notification established another tribunal namely International Crimes Tribunal-2. Thus, presently, two tribunals established under the ICTA (1973) are in operation with the same jurisdiction mentioned in section 3 of the ICTA (1973). The ICT-1 and the ICT-2 has separate rules of procedures of its own. The government simultaneously constituted a Prosecution team headed by a 'Chief prosecutor' under section 7 of the Act and the Investigation Agency under section 8 of the Act. A person shall be bound to answer all questions put to him by an Investigation Officer and shall not be excused from answering any question on the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such person: Provided that no such answer, which a person shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in criminal proceeding. On completion of investigation, the Investigation Agency is to submit a 'Report ' to the Chief prosecutor by examine which it shall prepare a 'Formal Charge' and shall submit it together with materials, documents, statement of witness etc. before the tribunal.

[78] 16 December 1996, 999 UNTS 3 (into force 3 January 1976). Bangladesh acceded to the ICCPR in 2000.
[79] War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates, Ridwanul Hoque, Australian Journal of Asian Law, 2016, Vol. 17 No 1, Article 5: 1-19
[80] Article 19 of the Rome Statute.
[81] Article 54(1) (b) of the Rome Statute.
[82] Cited in Robinson, 2009 (referring to Prosecutor vs Slobodan Milošević, Case No. IT-02-54-AR 73.4, Separate Opinion of Judge Mohammed Shahabuddeen, para 16, 30 September 2003). Cited from Hoque, 2016.

© This work is licensed under CC BY-NC-SA 4.0

In the cases put in front of ICT-BD, it has always been seen that, the defense has claimed that it was not treated fairly. Their main complaints were that they were not allowed regular contact with their attorneys, the tribunal barred all observers, the defense was not given the chance to adequately prepare or consult foreign attorneys, and the judges were not free from partiality and bias.[83]

However, the court found these accusations unjustified. In *Molla,*[84] Miah, J (at p.273) commented that 'the essence of fair trial' is instilled into the 1973 Act. Chowdhury, J also discussed the fair trial issues and found that the 1973 Act incorporated the concept of due process.[85]

This universally-accepted standard was upheld when the tribunal found Abdul Quader Molla not guilty in one of the six charges against him. In another case, Ghulam Azam[86] was granted additional time to prepare his appeal but disagreements were always there on the part of the defendants rising to debates.

In *Molla,* the tribunal found that the defense was deliberately trying to delay the proceedings by presenting a large number of witnesses, and thus imposed a restriction on the number of witnesses. This was done with other cases too (2939 defense witnesses in *Azam,* 1153 in *Chowdhury,* 1000 in *Kamaruzzaman,* and 3328 in *Alim.)*[87]

In accordance with international standards, trials are open to all and must proceed without undue delay. The accused are given adequate time and facilities to prepare their cases. Prosecutors must furnish them a list of witnesses along with the copies of recorded statements and documents upon which they intend to rely. Defendants also have an unfettered right to call witnesses and to cross examine prosecution witnesses. The tribunals also abide by the standard that if there is no witness for a crime, there is no conviction. Salauddin Quader Chowdhury had six of 23 charges dropped because the prosecution failed to bring witnesses to support the charges. He was ultimately acquitted of 14 charges.[88]

Another complaint by the defense was about the retrospective nature of the Tribunal, which is to say that there was no law in Bangladesh regarding the punishment of war criminals during 1971. The court dismissed this complaint too. While it is true that the ICT-BD works retrospectively, its justification can be found if one is willing to look at the scale of genocide and destruction committed during 1971. Genocide law is a *jus cogens* principle[89] in

[83] War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates, Ridwanul Hoque, Australian Journal of Asian Law, 2016, Vol. 17 No 1, Article 5: 1-19
[84] The Government of the People's Republic of Bangladesh vs Abdul Quader Molla (2013) 3 LNJ (AD) (2014) 121
[85] The reasoning behind the comment was as follows – "To ensure that the trial proceeds fairly and in accordance with universally recognized fair trial procedure, the Tribunal explicitly stated in its Judgments that the provisions of the act and the rules framed there under are adequately compatible with the rights of the accused as granted by Article 14 of the ICC PR and that in trying the offences under the general law our Courts take into account recognized jurisprudence from around the world."
[86] Chief Prosecutor vs Professor Ghulam Azam, ICT-BD Case No. 06 OF 2011.
[87] http://ict-bd.org
[88] The Chief Prosecutor vs Salauddin Quader Chowdhury, ICT-BD Case No. 02 Of 2011
[89] Rome Statute (preamble), and the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

© This work is licensed under CC BY-NC-SA 4.0

International Law, and the court stated in *Molla* that it is a duty of any state to try and punish crimes this severe, and their need not be an 'international conflict' to punish these crimes under international law. In fact, criminal matters do not have any bar of limitation regarding time. A criminal case can be tried anytime. Thus the court was in jurisdiction to try these crimes.[90]

There was a specific complaint about a judge in the ICT tribunal. The complaint intensified after the judge, Huq, J was accused in a Skype-conversation scandal. It is however, to be noted that, Huq, J resigned his post before the Tribunal could lay down any judgment. Even if he was biased he could not implement his decisions on any of the verdicts.

Noted, there are some shortcomings of the Act. Most importantly, it stays vague in the stage of definition, which do not include sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. Also, it can be debated that the bar from challenging the court is a shortcoming, but it has to be considered that given the defendants' deliberate tactic to delay and hamper the trials, they could have abused this right and declared any and all probable judges biased. Another challenge of the Act is the lacunae of specific provisions considering the trial of local collaborators, who were the auxiliary forces instead of trying the primary perpetrators i.e the Pakistani military officers.

Two factors come into consideration here. Firstly, as stated before, the burden of the trials of the Pakistani officials have been taken over by the Pakistani government itself, and by dint of the Simla Pact they are bound to see through it. However, this becomes more of a diplomatic question rather than a legal one, on how to make the Pakistani government see through to it. Secondly, the trials of war collaborators is nothing new, and has been going on since the Nuremberg trials. It has been clarified in the case of *Chief Prosecutor versus M Sakhawat Hossain & 7 others*, that 'The clemency given to the admitted prisoners of War, pursuant to the tripartite agreement of 1974, in no way, either match the Act of 1973 or any of its provisions ineffective, invalid or void'[91]. It has also been stated that, ''The Simla Pact itself is void to the extent of its inconsistency with, or repugnancy to, a body of existing *jus cogens* principles of international law. Hence, there appear to be no insurmountable legal obstacles to prosecute Pakistani and Bangladeshi nationals for their alleged commission of genocide.'[92]

Most importantly, it is to be considered that, the Tribunal has had judicial independence, a much-needed element to ensure fair trials.[93] Also, the Rules of Procedure of 2010 made sure

[90] According to the UNGA resolution 2391 (GA Res. 2391, UN Doc. A/7218 (1968), at 3), the crime of genocide also constitutes a crime against humanity, 'even if such acts do not constitute a violation of the domestic law of the country in which they were committed'. Another UNGA resolution (GA Res. 2840, UN Doc. A/8429, at 88 (1971), at p. 2), adopted two days after the surrender of Pakistani troops in Bangladesh, further affirmed that refusal by any State to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes/crimes against humanity is contrary to the principles of the UN Charter and to generally recognized norms of international law.

[91] Chief Prosecutor versus M Sakhawat Hossain & 7 others, ICT-BD [ICT-1] Case No.04 OF 2015 (p.16). (Issues no. v, viii, ix & xi)

[92] Crimes against Humanity: An assessment of Bangladesh's response in a comparative perspective; the cases of Cambodia and Iraq, Paolo Casaca and Susan Guarda, SADF Working Paper, 2018, Issue No. 1

[93] The International Crimes (Tribunals) Act, 1973 (Act No. Xix Of 1973) (amended); Section 6(2A)

© This work is licensed under CC BY-NC-SA 4.0

that the defendant had an array of rights including the presumption of innocence, and the burden of proof being on the prosecution.[94]

All the complaint points were later rebutted and clarified in the referred case[95], which stated that, "There is no rule of CIL that prohibits our domestic Tribunal to proceed with the trial as per our domestic legislation"; and also, "(iii). Our domestic Tribunal has the jurisdiction to continue with the trial in any manner acting in derogation of rules of public international law; (iv). There is nothing repugnant to CIL in the Act of 1973, rather it is consonant with the provisions of CIL [..]".

There have been several distinct complaints about the ICT-BD concerning legalities. The discussion above defends the legality of the Tribunal and shows that, the complaints are dismissible and the trial process is completely legal. This can be derived from the case referred above, too.

Conclusion

This paper has tried to show that the International Crimes Tribunal of Bangladesh follows the international norms set by previous war crimes tribunals and the leading legislations like the Rome Statute. It has the core themes of fair trial and independence of the judicial body built into it, and it has provided sufficient berth for the accused to defend themselves. It is in no way sub-par from any international standard regarding the trial of war crimes. Although the defense has claimed that it has been deprived of fair treatment in some cases, it has been argued that the decisions made in the court were indeed within jurisdiction of the tribunal.

It has to be admitted that, no legislation can be perfect and flaws can come up from different angles, with a room for improvement always present. The initial Act of 1973 had indeed many flaws, which were amended several times to give the Act its present structure. However, the present structure also has some room to improve. Firstly, the bar to the right of the defendant to approach to a higher court without seeking appeal could be reconsidered, as it might deprive the defendant of his rights in some way. Another one of the loopholes of the Act, which until now has not been properly addressed, is the approach towards civilian collaborators beyond the military personnel. Although it can be totally justified given their deeds, and also by International Law which imposes criminal responsibility over anyone who have committed such deeds – there is not sufficient complementation on this topic, and this remains a weak point. Addressing this would finally resolve the debate of 'political agenda' which has been plaguing the trials since the beginning, since it can properly justify the conviction of the civilian collaborators and the conviction of Jamaat as an 'organization'. To counter this, the Act could follow the 'concurrent jurisdiction' doctrine set up by ICTR.

[94] International Crimes Tribunal Rules Of Procedure, 2010 [as amended by the International Crimes Tribunal Rules Of Procedure (Amendment), 2010 and International Crimes Tribunal Rules Of Procedure (Amendment), 2011]

[95] Chief Prosecutor vs M Sakhawat Hossain & 7 others ICT-BD [ICT-1] Case No.04 OF 2015 (p.16).

© This work is licensed under CC BY-NC-SA 4.0

The road of the Bangladeshi people to justice has been long and arduous, and there has been the fair share of perils. The commitment and the grit of the Bangladeshi scholars, the judiciary and the common people stand as a proof of the legitimacy of the trials, and moreover the right of the Bangladeshi people for justice. It is a matter of regret that there have been various attempts to color the process in a different light, calling it a 'political targeting', 'victor's justice' and 'a ploy the de-Islamize the nation'. It is not really fair to raise complaints about human rights regarding the trial without realizing the full context of the trials, the history of bloodshed behind it. It is rather satirical that the trial attempts for one of the biggest genocides in human history are being flagged as 'violation of human rights', and for the wrong reasons and assumptions.

We sincerely hope that the trial process, in its entirety will proceed smoothly and what is left of the war criminals will be given their dues. Moreover, it is time that the International Community holds Pakistan to its promise of trying its own military personnel for war crimes, because the issue has been avoided too long. The long-dead martyrs and their families deserve both closure and justice.

Bibliography

Ahmed, Imtiaz 'Historicizing 1971 Genocide: State Versus Person [2009] (Dhaka: University Press Limited)

Amir-Ul Islam, M., Morten Bergsmo, Cheah Wui Ling, 'Old Evidence and Core International Crimes' (Torkel Opsahl) 254

Anupam Debashis Roy, 'Shahbag stolen? Third force dynamics and electoral politics in Bangladesh,' Howard University, Washington DC, USA

Bangladesh: Government Backtracks on Rights (*Human Rights Watch*, 2013)

Bangladeshi editor sentenced for contempt, *The New Statesman* (20 August 2010)

Brownmiller, Susan, Against Our Will: Men, Women and Rape [1975] Ballantine

Casaca, Paolo. Guarda, Susan, 'Crimes against Humanity: An assessment of Bangladesh's response in a comparative perspective; the cases of Cambodia and Iraq' [2018] SADF Working Paper Issue No. 1

Charter of the Military Tribunal (Nuremburg Tribunal) of 1945

Chief Prosecutor vs M Sakhawat Hossain & 7 others ICT-BD [ICT-1] Case No.04 of 2015 (p.16)

Chief Prosecutor vs Professor Ghulam Azam ICT-BD Case No. 06 of 2011

Chief Prosecutor vs Salauddin Quader Chowdhury, ICT-BD Case No. 02 of 2011

Convention on the Prevention and Punishment of the Crime of Genocide 1948

Court Decisions (Bangladesh)

© This work is licensed under CC BY-NC-SA 4.0

Court Decisions (International Tribunals)

G. Robertson, 'Report on the International Crimes Tribunal of Bangladesh' [2015] Sarajevo: International Forum for Democracy and Human Rights 18

Harris, Ralph, 'Nixon and Pakistan: An Unpopular Alliance' [1971] The Miami News. Miami, Florida, US. Reuters

ICTY, The Prosecutor vs Radovan Karadzic, IT-95-5/18-T

International Covenant on Civil and Political Rights 1966 (ICCPR)

Jain, Neha, 'Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration', [2013] 61

Jamaat attacks cops in Jessore, *The Daily Star* (4 January 2013)

Kibria, Nazli, 'Muslims in Motion: Islam and National Identity in the Bangladeshi Diaspora' [2011] (Rutgers University Press) 19

Nuremberg Revisited, *The Daily Star* (September 20, 2013)

Prosecutor vs Slobodan Milošević, Case No. IT-02-54-AR 73.4

Protesters vow to resist anti-lib forces, *The New Nation* (24 February 2013)

Rahman, Mashiur, 'Analysis: Calls grow for banning Jamaat-e-Islami in BD'. *The Express Tribune* (28 February 2013)

Ridwanul Haque, 'War Crimes Trial in Bangladesh: A Legal Analysis of Fair Trial Debates' [2016] Australian Journal of Asian Law Vol. 17 No 1 Article 5: 1-19

Saikia, Yasmin. Elizabeth D. Heineman, 'Sexual Violence in Conflict Zones: From the Ancient World to the Era of Human Rights' [2011] (University of Pennsylvania Press) 157

Sanoj Rajan, 'Domestication of International Criminal Law: International Crimes Tribunal of Bangladesh, A Case Study', [2012] 132

Schmitt, M.N., Arimatsu, Louise, McCormack, T., 'Yearbook of International Humanitarian Law' [2010] (1st ed., Springer) 463

Shibir man behind blogger killing, *The Daily Star* (2 March 2013)

Six cops injured in Jamaat attack at Pirojpur, *New Age.* (8 December 2012)

Statute of the International Criminal Court 1998 (the Rome Statute).

Statute of the International Criminal Tribunal for Rwanda 1994

Statute of the International Criminal Tribunal for the former Yugoslavia

Swarajya Magazine, 'December 1971: When The US Sent Its Naval Ships Into Bay Of Bengal, And USSR Responded'

The (Delhi) Agreement between India and Pakistan on Repatriation of People (28 August 1973)

© This work is licensed under CC BY-NC-SA 4.0

The (Simla) Agreement between India and Pakistan on Bilateral Agreements (2 July 1972)

The Bangladesh Collaborators (Special Tribunals) Order 1972 (repealed in 1975)

The Case Concerning the Trial of Pakistani Prisoners of War (Pakistan v India), [1973] ICJ Reports 347

The Constitution (First Amendment) Act 1973

The Constitution of the People's Republic of Bangladesh (1972)

The Eichmann Case, 36 Intl. L. Rep. 5 (Israel, Dist. Ct. Jerusalem 1961)

The Government of the People's Republic of Bangladesh vs Abdul Quader Molla (2013) 3 LNJ, (AD) (2014) 121

The International Crimes (Tribunals) Act 1973 (as amended latest in 2013)

The International Crimes (Tribunals) Rules 2010

Tripartite Agreement between Bangladesh, India, and Pakistan on the Repatriation of Prisoners of War and Civilian Internees (9 April 1974).

Universal Declaration on Human Rights 1948

W. Van Schendel, 'A History of Bangladesh' [2009] (Cambridge University Press) 110, 111.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

A Legal Study on Muslim Women's Guardianship and Custody Rights in Bangladesh

Ms. Tanima Rahman, Advocate, Supreme Court of Bangladesh

Abstract

Owing to the disproportionate traditional, social and religious practices, the position of women in Bangladesh remained inferior in society. Although the Constitution of Bangladesh guarantees both men and women to provide equal rights in all spheres of state and public life, in reality this equality in the law is not applicable to women because the separate personal laws, which govern family lives of citizens of Bangladesh, reflect gender inequality. Women are not permitted to have equal status and rights in areas of property, marriage, divorce, guardianship and child custody. Mothers following to separation are not entitled to claim child's custody after a specific period of time, let alone guardianship. The study attempts to examine child custody and guardianship laws in Bangladesh after couple's depart due to separation, dissolution of marriage or divorce; furthermore, the paper critically argues for the vulnerable position of women in the society and explains how women in Bangladesh are oppressed by religious fanaticism. In this essay child custody and guardianship laws in Bangladesh after couple's depart, conflict between guardianship law and CEDAW (the Convention for the Elimination of All Forms of Discrimination against Women) provisions, and court's attempts towards establishing welfare doctrine above personal law will be discussed.

Introduction

In the era of globalization the traditional concept of society, culture, and right have changed. Globally women have become conscious about civil rights and have raised their voice for the demand of equal rights in all spheres of life. In response to that demand some positive measures have been taken by international organizations for the promotion and protection of women's rights. Like many counties in the world, Bangladesh government ratified a number of basic human rights conventions for the development of women's position in the country; however, such ratifications could not able to bring significant changes to the status of women in the society since several national laws do not provide women with equal rights. Muslim women do not have equal access to property, marriage, divorce, guardianship and custody rights. In Bangladesh father is the natural guardian of child and mother is entitled for custodianship of child for certain years only. Such law is unrealistic form the point of view of contemporary world and discriminatory towards women. In this essay Muslim women's guardianship rights in Bangladesh and why the guardianship law contradicts with core provisions of the CEDAW (the Convention for the Elimination of All Forms of Discrimination against Women), and other international treaties will be discussed. The essay in will briefly describe the status of

© This work is licensed under CC BY-NC-SA 4.0

international law in domestic judicial system of Bangladesh and explain court's contribution towards ensuring equal rights to women by applying doctrine of welfare in various lawsuits regarding guardianship and custody rights in Bangladesh.

Muslim Women's Guardianship and Custody Rights in Bangladesh

In Bangladesh guardianship and custody rights are governed by Muslim family law, provisions of which are largely based on Islamic law. According to Muslim family law father is the natural guardian of child and after death of father paternal grandfather or his executor becomes the guardian of the child. Under Islamic jurisprudence a mother is not guardian of her child although she can claim for the custody of the child until boy turns seven and girl becomes eighteen years old. If father or in absence of him grandfather fails to take reasonable care of child, mother can plea for an immediate custody of the child by filing lawsuit under article 102 of the Constitution of Bangladesh[96] on the ground of welfare issue of child. However, because of social and religious structure of society, in reality mothers in Bangladesh have little scope to apply for custodianship of minor under Muslim family or personal law. [97]

The conflict between International Law and Personal Law

Bangladesh ratified CEDAW (the Convention for the Elimination of All Forms of Discrimination against Women) with reservations on Articles 2, 13.1(a), 16.1(c) and (f) on the basis of religious sentiments. While the government of Bangladesh feels that these provisions conflict with personal laws, human rights activists believe that such reservations are repressive to the protection and promotion of the rights of women.[98] The imposition of reservations, and in particular the reservation on Article 2[99], has been criticized by civil society as being contrary to the spirit of the Convention as well as provisions of the Constitution of Bangladesh since article 28 (2) of the Constitution provides for equal rights for men and women in all spheres of state and of public life of Bangladesh.

Although Bangladesh ratified CEDAW for quite a long time ago, no step has been taken to incorporate the provisions of the Convention into national legislation. Recently government has withdrawn the reservations from Article 13(a)[100] (equality as to the right to family benefits) and Article 16(1)(f)[101] (equal rights and responsibilities with regard to guardianship, trusteeship and adoption of children etc), and CEDAW committee welcomed the government for taking such step of withdrawal. However, Bangladesh government has been criticized both internally

[96] Article 102 of The Constitution (Fourteenth Amendment) Act 2004
[97] A.A. Na'im, 'Islamic Family Law in a Changing World,' London: Zed Books Ltd, p. 140, 2009.
[98] AWORC, 'CEDAW and Women: The Bangladeshi Experience', WPRN Newsletter, 1998.
[99] Article 2 of Convention on the Elimination of All Form of Discriminations against Women 1979
[100] Article 13(a) of Convention on the Elimination of All Form of Discriminations against Women 1979
[101] Article 16(1)(f) of Convention on the Elimination of All Form of Discriminations against Women 1979

© This work is licensed under CC BY-NC-SA 4.0

and externally for maintaining reservations on the core provisions - Article 2[102] and 16(1)(c)[103] of CEDAW.

Not only do provisions of personal law conflict with the obligations of CEDAW, but said laws contradict with Charter of the United Nations. Under Article 55(c) of the Charter of the United Nations[104] Bangladesh is obliged to promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to, inter alia, sex, and under Article 56[105] the country is liable to ensure gender equality and to combat discrimination against women. In addition, Bangladesh is required to ensure equal rights between men and women under the ILO Conventions, thus such discriminatory provisions of guardianship law put Bangladesh on the verge of its international obligations in terms of providing equal rights to women.[106]

Domestic Law Prevails on International Conventions

In Bangladesh, if there is a clear domestic legislation on an international issue, the court will give effect to the domestic legislation.[107] In *Bangladesh v Sombon Asavhan*[108] it was held that "where there is a municipal law on an international subject the national court's function is to enforce the municipal law." Therefore, if there is an issue regarding guardianship, the court will look at the personal laws and not the international treaties even though under the personal laws women are treated unequally, which contradicts to the provisions of CEDAW or Charter of the United Nations.

Incorporating international legislation into domestic laws is a legal requirement and a general principle in Bangladesh. The Constitution of Bangladesh does not contain any clear provision about implementation of international treaty into national legal system. Thus, in Bangladesh every international treaty requires to be incorporated into the domestic law in order to enforce in the courts.[109] In the case of *Hossain Muhammad Earshad v Bangladesh*[110] the court stated that "it is true that Universal Human Rights norms whether give into Universal Declaration or other covenants are not directly enforceable in national courts, but if their provisions are incorporated in domestic law, they are enforceable in national courts."[111]

[102] Article 2 of Convention on the Elimination of All Form of Discriminations against Women 1979
[103] Article 16(1)(c) of Convention on the Elimination of All Form of Discriminations against Women 1979
[104] Article 55(c) of the Charter of United Nations 1945
[105] Article 56 of the Charter of United Nations 1945
[106] T. Afroz, 'CEDAW and the Women's Rights in Bangladesh - a promised Silver Lining', < http://www.worldnewsbank.com/tureen-seminar.html> Last accessed on 3rd October 2017
[107] S.H.Rahman, A. Faruq, 'Status of International Law Under the Constitution of Bangladesh and Appraisal', Bangladesh Journal of Law 23, p 40, 1999.
[108] Bangladesh v Sombon Asavhan 32 DLR,198 Supreme Court of Bangladesh 1985
[109] Supranote 2
[110] Hossain Muhammad Earshad v Bangladesh 21 BLD (AD) , p 69, 2001
[111] Ibid

© This work is licensed under CC BY-NC-SA 4.0

Court's Attempts towards Establishing Welfare Doctrine above Personal Laws

In Bangladesh, guardianship matters are mainly governed by the Guardian and Wards Act, 1890. The act has given family courts the authority to choose child's custodian and guardian according to both personal law and welfare doctrine. By the virtue of this act the doctrine of welfare of children has achieved an implicit importance over the past decades, and a noticeable shift of applying the doctrine relating to guardianship has been noticed in the court proceedings.[112]

Personal Law or Welfare Doctrine

Although the court is required to make decision on child's guardianship matters in compliance with both personal law and welfare doctrine, in many real situations it has been observed that the orthodox position of personal laws is in conflict with the child's welfare doctrine. The court's interpretation about the applicable law in *Ayesha Khanam v Major Sabbir Ahmed*[113] made an important contribution in clarifying which law shall prevail on the issue of such conflict. The court in its judgment affirmed that where there is a conflict between personal law and welfare doctrine, the welfare doctrine will prevail. In the said case a child was living with mother at his maternal grandparents' house since he was born. However, after obtaining the divorce notice, one evening father abducted the child from school premise. Left with no other choice the mother filed a case under 102(2)(b)(i) of the Constitution[114]; in the judgment the High Court directed father to hand over son to the mother and granted him with a visitation right only.

Matters Related to Age and Sex

The age and sex of the minor plays a determining role regarding the custodianship of mother (also known as hizanat) under personal law. In Abu *Bakar Siddique v SMA Bakar*[115] it was observed that not only is the question of hizanat of minors depend on child's age or sex, but also depend on considerations of minor's welfare. In this case father (appellant) filed an application under section 25 of the Guardianship and Wards Act[116] for the custody of his minor son, who was eight year old. Mother was a doctor by profession and upon getting a job moved to Saudia Arabia. The husband and son also accompanied her initially, but after a while the husband came back to Bangladesh leaving their minor son alone with the mother. After that the mother filed a suit for dissolution of marriage and as she was unable to look after the son properly due to busy schedule at work, she sent the son to Bangladesh to live with her relatives. In the meantime the child developed some medical complications, for which his mother and maternal aunts took him abroad for treatment. The mother bore his entire medical expenses and

[112] 'Report on 'Legislative Initiative and Reforms in the Family Law', BLAST. 2011.
[113] Ayesha Khanam and others v. Major Sabbir Ahmed and Others, 13 BLD (HCD) 205, 1993
[114] Article 102(2)(b)(i) of The Constitution (Fourteenth Amendment) Act, 2004
[115] Abu Bakar Siddique v. S.M.A. Bakar, 38 DLR (AD) 106, 1986
[116] Section 25 of the Guardianship and Wards Act, 1890

© This work is licensed under CC BY-NC-SA 4.0

ultimately left the job to take care of the child. The High Court observed age of the son was above seven and found that father shall be both guardian and custodian of an eight years old son under the personal law. However, due to careless attitude of the father towards both son and family, the honorable judge let the mother hold custody on the ground that welfare of the son lies to the mother. In the judgment the learned judge mentioned "even though the well-known Muhammadan jurists may disagree with the statement, in Bangladesh questions regarding hizanat of a minor boy or girl do not depend merely on his or her age but depend on the concerns of the welfare of minor."

Matters Regarding Mother's Remarriage

Generally when a Muslim mother remarries to a stranger, it often works against her in disputes involving custody and guardianship rights. It is now established from the court practices in Bangladesh that a mother's remarriage to a stranger does not curtail her right to obtain custody of children; in addition, if court finds it appropriate, she can also be declared as guardian of children in certain circumstances. In *Johara Begum v. Maimuna Khatun*[117] case appellant was mother of minor and respondent was mother-in-law of the appellant. When the mother remarried child's paternal grandmother filed an application to be appointed as guardian of both the minor and his property by saying that mother was not fit to take care of the child. The High Court Division allowed the appeal relating to modifying the order of lower court and stated that provisions of Mahomedan Law do not impose any binding on courts to protect minor's interest, and mother shall not be disqualified to be appointed as guardian of child merely because of her second marriage.

Child's Closeness towards Guardian

In another case named *Rahela Khatun v. Ramela Khatun and anothesr,*[118] Ramela Khatun, who is the mother, filed an application before district court to be appointed as guardian. Rahela Khatun was a distant paternal aunt of minor, and she was in possession of properties left behind by deceased father of the minor. Mother's application was contested on the ground that she had remarried. The District judge allowed the application and appointed the mother as guardian of the minor and his properties. It was held in appeal that in appointing guardian of a minor court shall look at factors such as age, sex, religion, character, capacity of the proposed guardian, and his or her closeness to the minor. Marriage of mother with a stranger does not relinquish her right absolutely to obtain custody of minor. Appointment of a remarried mother as the guardian of minor is consistent with the personal laws if the mother in question is found to be the best among all persons, to who's charge and care the minor shall be raised.

[117] Johara Begum v. Maimuna Khatun, 16 DLR 695, 1964
[118] Rahela Khatun v. Ramela Khatun and Another 22 DLR 608, 1970

© This work is licensed under CC BY-NC-SA 4.0

Women, Medieval Society, and the Guardianship Law

It is evident from the history that in the pre Islamic era position of women in society was not more than a mere chattel. Women did not have any property rights and even were sold in markets as commodities. In many families a girl child used to consider as curse, the consequence of which led to build a horrifying custom of burring female newborns alive. In such a rampant and dark period of Arab society; Islam came to as light. The newly introduced religion provided women with rights to property, marriage, maintenance, and custody. However, women were not allowed to have proper education and were not permitted to earn livelihood. While role of husbands was to work outside and earn money, the responsibility for women was giving birth to children and nourishing them properly; therefore, most women, who did not inherit any property from father or previous marriage, were entirely depended on husbands for economic solvency.[119]

On the other side of this context, as Islam was a new religion, to establish its regime in the world Muslims involved themselves into continuous conflicts with other religious and ethnic groups. Since men had to participate in these wars on regular basis, a significant number of male population were dying at early age, and to those young widows, who had no source of income because of unequal and stigmatized viewpoints, remarriage remained only option left to them to ensure social and economical protection in society. At this point, a disparity in the proportion between male and female population was observed in the country because more men were dying out in wars than their female counterparts. As Islam made it necessary for woman to have a male guardian throughout her life, a major number of married Muslim men were remarrying widows in order to provide shelter. Thus, in such circumstances of medieval society, guardianship right was vested solely on the closest male relative of the child because welfare of child was more inclined towards father or grandfather than economically vulnerable mother.[120]

Conclusion

In medieval period laws relating to guardianship were modern and realistic; however, present guardianship laws in Bangladesh are unrealistic and do not comply with current state of society. Such laws are inconsistent with several international human rights instruments and the Constitution of Bangladesh itself. 21st centaury's women are highly educated and independent in their own terms. They are self-sufficient and able to take best care of their child than anyone else. As society has changed laws should be reformed as well. Thus, instead of making reservations on the name of religious values government of Bangladesh should take steps to reform the provisions of personal laws and draft a progressive law for the modern world in

[119] B. Martin, 'The Spread of Islam', Africa, Bloomington: Indiana University Press, 1986, pp.87-88
[120] J. Abbink, 'Ethopian Islam and the Challenge of Diversity', ISIM Newsletter 1999, p.24.

© This work is licensed under CC BY-NC-SA 4.0

compliance with the spirit of 'Sharia' that will let women to be declared as guardian of child along with father.

Bibliography

Abbink, J, Ethopian Islam and the Challenge of Diversity, ISIM Newsletter, 1999.

Abu Bakar Siddique v. S.M.A. Bakar, 1986, 38 DLR (AD) 106.

AWORC, CEDAW and Women: The Bangladeshi Experience', WPRN Newsletter, 1998< http://www.aworc.org/bpfa/pub/sec_i/hum00001.html> Last accessed on 1st October 4, 2017

Ayesha Khanam and others v. Major Sabbir Ahmed and Others, 1993, 13 BLD (HCD) 205.

Bangladesh Mahila Parishad , Bangladesh National Women Lawyers Association , Naripokkho, A Commentary on Bangladesh's Combined Third and Fourth Periodic Report for the Members of the United Nations Committee on the Elimination of Discrimination Against Women, International Women's Rights Action Watch, 2003.

Bangladesh v Sombon Asavhan 32 LR (1980) 198 Supreme Court of Bangladesh.

Begum, A., Protection of women's Right in Bangladesh: a Legal study in an International and Comparative Perspective, University of Wollongong Thesis Collection, 2004.

Bunch, E., Women Rights as Human Rights: Towards a Re-vision of Human Rights, 12 Human Rights Quarterly, 1990.

Convention on the Elimination of All Form of Discriminations against Women 1979.

Hauqe, A., Hossain, S., Muslim Women's Rights under Bangladesh Law, SAILS, 2011.

Hossain Muhammad Earshad v Bangladesh 21 BLD (AD).

Johara Begum v. Maimuna Khatun, 1964, 16 DLR 695.

Martin, B, The Spread of Islam', in P. M. Martin and P.O'Meara(eds), *Africa*, Bloomington: Indiana University Press, 1986.

Na'im, A., Islamic Family Law in a Changing World,' London: Zed Books Ltd, 2009.

Rahela Khatun v. Ramela Khatun and Another, 1970, 22 DLR 608.

Rahman, H., Status of International Law Under the Constitution of Bangladesh and Appraisal,Bangladesh Journal of Law, 1999.

Report on Legislative Initiative and Reforms in the Family Law, BLAST, 2011.

© This work is licensed under CC BY-NC-SA 4.0

Shelton, D, International Law and Domestic Legal System: Interpretation, Transformation and Persuasion, Oxford International Press, 2004.

The Constitution (Fourteenth Amendment) Act 2004.

The Guardianship and Wards Act 1890.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

Ship Breaking in Bangladesh and Its Impact

Tanima Rahman, Lecturer, School of Law, East West University.

Abstract

Ship breaking is a process of dismantling old ships for scrapping. While in order to save the environment from toxic waste most countries are following strict environmental rules and regulation, Bangladesh on the other hand is still pursuing environmental laws that are flexible in nature and less rigorous towards maintaining toxic substances and waste disposal. Bangladesh being a poor and over populated country, labour cost is reasonably low here. For working 8-9 hours a day, a labour at the shipyard gets only 85-180 taka (1-2 USD) as salary. They get no overtime, sick or annual leave. Owing to such weaker environmental laws and cheap labour cost, Bangladesh has become a lucrative place for the development of ship recycling. Currently, 52 percent ships from all over the world are send to Bangladesh for scrapping. However, the hazardous materials from ship exteriors are causing serious pollution to the beach and surrounding marine environment. Workers at the shipyard are working in an inhuman condition without safety equipment. Fatal injuries and accidental deaths of the workers has become daily incidents. Thus, ship braking in Bangladesh has become a subject to major human rights violation. Nevertheless, the industry represents a significant source of employment and income for a large number of people in the country. The object of this article is to examine the challenges and opportunities of ship breaking industry in Bangladesh and to recommend government to pass a new eco-friendly law regarding ship breaking based on the core provisions of Basal Convention, so that ship breaking industry in Bangladesh can prosper without violating the environmental and labour rights.

Introduction

Bangladesh is a small and over populated country with a long coastal belt of about 710 km. Most of these costal arears are situated in a city named Chittagong, a city enriched with enormous natural resources and scenic beauty. However, Chittagong, being the largest commercial city in Bangladesh and having a sea port, has become a home for a significant number of the ship breaking yards. Most of these yards are built in the seashore areas of Sitakund, which is an administrative unit of Chittagong and situated to the north of the city closer to Bay of Bengal. Ship scrapping first started in Bangladesh in the early 1960, however, commercially it was started in the late nineteen seventies,121 and currently, it holds a paramount importance to the macro and micro economy of the poverty stricken Bangladesh. At present, the largest ships of the world are cut in the shipyards of Bangladesh, and recently the country has been ranked 2nd in the list of top ship scrapping nations worldwide.122 The amount of revenue that the government of Bangladesh earns from ship breaking is quite high. It has been estimated that the government earns around 1000 crore taka each year from this

[121] M, Hossain, Ship Breaking Activities and its Impact on the Coastal Zone of Chittagong, Bangladesh: Towards Sustainable Management, Chittagong, 2006

[122] https://www.shipbreakingbd.info/Shipbreaking%20around%20the%20w orld.html, last retrieved on November 17, 2018

© This work is licensed under CC BY-NC-SA 4.0

industry.123 Although ship braking is generating a huge revenue, it has always remained notorious for causing extreme form of environmental and labour rights violation inside the country. The purpose of this research paper is to discuss the socio economic impact of the ship breaking industry in Bangladesh and study different core international laws regarding this matter. The article proposes that Bangladesh should incorporate the principals of international instruments on ship breaking and amend its existing laws or enact a new legislative scheme that will protect the environmental and labor rights without dispelling the industry.

Background of Ship Breaking in Bangladesh

In the year 1964 affected by sea storm a Greek ship named "MD Alpine" was got damaged and confined at Foujdarhat seashore of Sitakund, Chittagong. After remaining there for months, a local steel company, the Chittagong Steal House, bought the "MD Alpine" and scrapped it for raw materials. Afterwards, during the liberation war in 1971 a Pakistani ship called "Al Abbas" was destroyed at the Chittagong sea port by the bomb blast. In 1974 the ship was rescued from the Foujderhat, seashore by a Soviet Salvation Team, and later on like "Md Alpine", "Al Abbas' was also purchased by a local company named the Kharnafully Metal Works Ltd for scrapping.124 Between 1980 to 1984, a number of salvation ships were brought to the Chittagong port and many shipyards wear built. Today, Bangladesh has more than 350 ship yards and the country annually earns approximately US$ 130 million revenues from this industry. 125

Socioeconomic Impact

Mostly because of cheap labor cost and less strict environmental regulations, this quick progress of the ship breaking industry could occur. Another important reason behind the escalation of the industry is due to the large tidal difference. The country has an inter-tidal zone, which is particularly suitable for beaching of the large vessels. However, the most important reason is the country's lack of strict requirements towards the "hot work" operation owing to this easy requirement Bangladesh could able to take the ship breaking business to such a considerable level.126

Currently, in Bangladesh about 2 lacks people are employed directly and around 0.1 million are working indirectly to this industry. Bangladesh has a demand of producing 50,0000 tons of steel each year. However, since Bangladesh has no mine or ore source, it fulfills the demand of raw materials for steel industry through ship scrapping. Each year the country scraps approximately 200,000 dwt of vessels and supplies around 60 percent of raw materials to the local steel industry. It earns a huge extents of revenue; annually government accumulates

[123] ibid
[124] S, Mashereque, Workers in Ship Breaking Industries: A baseline Survey of Chittagong (Bangladesh), Chittagong, 2005, at p22
[125] Basel Action Network Hazardous Waste Recycling: No justification for Toxic Trade: Briefing paper 7, Seattle Basel Action Network ;2014.
[126] ibid

© This work is licensed under CC BY-NC-SA 4.0

1000,00,00,000 Taka from the shipbreaking industry through import duty, yards tax and other taxes.127

Hazards of Ship Breaking

Nearly all the ships in the shipyards of Bangladesh are cut by an ancient method. While cutting, harmful substances such as organotin anti-fouling paint and carbon dioxide emits from the ship exteriors and get blended with air and water. In the year 2003 International Maritime Organization (IMO) banned the use of organotin compounds in anti-fouling paints as it contains Tributyltin (TBT), one of the most perilous element for the marine atmosphere.128 If TBT is released in the environment, it causes serious harm to the ecosystem and can even cause death to the living beings. In addition, other materials, for instance, burnt cables from the old ships discharges certain hazardous elements called poly vinyl chloride and asbestos into the air and make the air unbearable for breathing. A study done by YPSA has found that an average ship scrap that is cut in Bangladesh contains around 7.5 tons of various types of asbestos and up to 1,000 cubic meters of residual oil. All these harmful materials are getting mixed with the nearby marine environment and making the condition of the shipyard surroundings poisonous and uninhabitable.129 As the labours and habitants of neighboring areas are residing in such a contaminated environment, they are risking their health of getting severe lung disease.

Not only that labours at the ship yards of Bangladesh work in an unhealthy atmosphere, but also they work without sufficient safety equipment. Fatal injuries and accidental deaths occurring at the shipyards have become everyday phenomena. According to the Bangladeshi media in the last twenty years more than 400 workers were killed and 6000 were injured heavily due to authority's inefficiency in preserving occupational safety standard and providing labours adequate protection while working at the ship yard.130. Despite ship breaking being such a huge industry and posing grave repercussions on biodiversity and labour's rights, it is quite unfortunate that Bangladesh government still did not enact a specific legal regulatory framework on ship breaking, which can protect labour's occupational rights as well as minimize the damage done by the hazardous materials from the ships on marine environment.

Basal Convection and Relevant International Instruments

The Basel Convention on the Control of Transboundary Movements of Wastes and their Disposal 1989 is a revolutionary treaty that was created with the intention of minimizing the disposal of hazardous waste worldwide. The convention was approved in 1980 and came into force in 1992. In 1994, the Basel Convention adopted a new legislation called the Ban Amendment, the purpose behind incorporating the Ban Amendment by the Basal authority was

[127] Ship Breaking in Bangladesh, YPSA, 2012 https://www.shipbreakingbd.info/overview.htmlibid, Last ritrived on November 17, 2018

[128] S, Sharan, Ship breaking Dilemma: Economic Opportunity or Toxic Colonialism, CenPRIS Working Paper No. 132/10, July 2010

[129] Ibid 7

[130] YPSA: An Organization of Social Development, *Ship Breaking in Bangladesh*, retrieved July 17, website: http://www.shipbreakingbd.info/EnglishSite.php

© This work is licensed under CC BY-NC-SA 4.0

basically to make transportation of waste from OECD country (mostly developed countries) to non OECD country (developing countries) illegal. Although the intention was noble, it could not enter into force as it failed to obtain ratification from the required number of member countries.131

Article 4.2(g) of the Basal Convention states that if a country cannot manage hazardous waste in an environmentally sound manner, it will be prevented from the importation of resources that contain harmful waste materials for the surrounding environment. This article of the convention is related to the ship breaking as most of the old ships contain hazardous wastes and developing countries where these ships are sent for scrapping cannot protect environment from pollution by the hazardous substances emitting from the ships. The convention has also provided a list of names for wasteful materials, a number of which such as lead and asbestos are released from old ships during dismantling. Thus, under the Basal Convention if a country would like to import old ships for scrapping, it has to maintain a dismantling procedure that eliminates hazardous materials from the ships to be mixed with environment.132

Although the Basel Convention provides the core principles for the issue of ship breaking under the international law, there are other treaties that also deal with the problem of the ship breaking and waste disposal. One of such treaties is called The Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention). According to the Stockholm Convention PCBs, a toxic substance released during ship breaking, can be exported only if it is disposed through an environmentally sound way. Article 1(d)(iv) of the convention provides that in order to transport products containing hazardous waste substances across international boundaries, states should take appropriate measures towards waste management and every waste product should be dealt with standard rules and regulation. Article 19 of the Law of the Sea Convention 1982 states that if a ship, which is going to be dismantled, discharges any contaminated substance, it will make the state of the ship's flag liable of violating international customary law for causing transboundary pollution.133 In the trail of Smelter Arbitration, a groundbreaking case on the subject of transboundary pollution, the tribunal held that no state is allowed to do any act, which can cause harm to the property or environment of the other state. Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration both have embodied this principle of the Smelter Arbitration and articulated that states have a duty to make sure that activities taking place within their jurisdiction do not cause harm to the environment of other states. Therefore, as most ships contain contaminated substances and developing countries do not have mechanism to protect their environment from the harmful substances of old vessels, developed countries should refrain themselves from sending end of life ships to the developing countries as dismantling of the ship will result in environmental pollution.134

---

[131] S, Sharan, Ship breaking Dilemma: Economic Opportunity or Toxic Colonialism, CenPRIS Working Paper No. 132/10, July 2010

[132] D, David, 'Breaking up is hard to do: Environmental Effects of Shipwrecking and Possible Solutions Under India's environmental regime,' Pacific McGeorge Global Business & Development Law Journal 20: 220.

[133] H, David, International Environmental Law and Policy 3rd Ed., New York: Foundation Press, 2007, P 549

[134] T, Morita, 'N.I.M.B.Y. Syndrome and the Ticking Time Bomb: Disputes Over the Dismantling of Naval Obsolete Vessels.' Georgetown International Environmental Law Review (Summer 2005): 739.

© This work is licensed under CC BY-NC-SA 4.0

Thus, from the above analysis it is evident that knowing that due to lenient rule and ancient ship scrapping approach Bangladesh cannot able to manage the waste in an environmentally sound manner, exporting life ended ship containing hazardous wastes to Bangladesh, a developing country and a signatory to the Basal Convention, is a clear violation of the Basel Convention and other international instruments.

Conclusion

Bangladesh has regulations for governing ship breaking through sets of different laws related to environment and labour rights. The country has also ratified some of the international instruments such as Basal convention, ILO, IMO and UDHR, which are directly or indirectly associated with ship breaking. Since all these existing laws are not implemented strictly, the violation rate of labour and environment laws in the ship yards of Bangladesh is quite high. Among few leading NGOs, Bangladesh environmental Lawyers Association (BELA) is working actively towards the improvement of the environmental management system of the ship breaking yards of Bangladesh. In 2008 BELA filed a case against the government of Bangladesh where the honourable court directed the government to frame rules (in the light of six existing laws-- Basel Convention Act, 1989; Bangladesh Environment Protection Act, 1995; Bangladesh Marine and Fisheries Ordinance, 1989; Bangladesh Labor Act, 2006; Bangladesh Territorial Water and Maritime Zone Act, 1974, and Environment Protection Rules, 1997) for banning importation of hazardous ships for scrapping in Bangladesh.135 However, banning of ship breaking totally from the country will not be a worthy idea since ship breaking industry in Bangladesh has proved to be a profitable business and providing source of earning and employment to a significant number of people. Thus, instead of banning Bangladesh should try to protect this industry by implementing a sole ship breaking law based on the core provisions of the Basal Convention and take steps to modernize the mechanism of ship scrapping system, so the industry can exist in Bangladesh without causing harm to the environment and human rights.

[135] BELA v. Bangladesh and others, Writ Petition No. 7260 of 2008, M.T .Enterprise, last retrieved 2 November 2018, website: www.belabangla.org/pdf/pil.pdf

© This work is licensed under CC BY-NC-SA 4.0

Bibliography

Andersen, A, Worker safety in the ship-breaking industries, International Labor Office, Geneva, February 2010.

David Hunter et al., International Environmental Law and Policy 3rd Ed., New York: Foundation Press, 2007.

ILO. 2003. Draft guidelines on safety and health in ship breaking, Interregional Tripartite Meeting of Experts on Safety and Health in Ship breaking for Selected Asian Countries and Turkey Bangkok, International Labor Office- Geneva, May 2003.

International Labor Organization. Safety and Health in Shipbreaking: Guidelines for Asian Countries and Turkey, 2004.

Mashereque, S, Workers in Ship Breaking Industries: A baseline Survey of Chittagong (Bangladesh), Chittagong, 2005.

Md. M. Hossain and M. M. Islam, Ship Breaking Activities and its Impact on the Coastal Zone of Chittagong, Bangladesh: Towards Sustainable Management, Young Power in Social Action (YPSA), Chittagong, Bangladesh, 2008.

Nikos Mikelis, Developments and Issues on Recycling of Ships, The East Asian Seas Congress, 2006.

Nusrat Jahan, Occupational Hazards in Bangladesh-Garments & Ship breaking, Dhaka, 2010.

Philippe Sands, Principles of the International Environmental Law, 2nd Ed, Cambridge University Press, Cambridge, 2005.

Ronning, M, Stuck in the Mud: On ship breaking labor, condition and environment in Chittagong, Bangladesh, 2007.

Sharan Srinivas, Ship breaking Dilemma: Economic Opportunity or Toxic Colonialism, CenPRIS Working Paper No. 132/10, July 2010

Takako Morita, N.I.M.B.Y. Syndrome and the Ticking Time Bomb: Disputes Over the Dismantling of Naval Obsolete Vessels, Georgetown International Environmental Law Review, 2005.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

The Legal Standpoint of SOLAS Convention for Maritime Safety and Security

Nishat Tarannum, Lecturer, Bangladesh Maritime University, Bangladesh

Abstract

This paper aims to analyze the implication of SOLAS Convention in respect of safety of mercantile ships in the present framework of international singularities. Significantly this paper illustrates how SOLAS Convention is predominantly imperative in the regime of maintaining the international standards about various issues resembling construction of ship, taking precautions while navigating as well as having proper lifesaving utilizations, competence of the crew and safeguarding competent manning. Consequently, this paper explores the role of flag state for ensuring safety of life at sea. Again it elucidates about how the flag states imply and enforce the standards of the convention. Moreover in this paper the port state control with regard to warranting safety of ships have duly mentioned. As the notion of 'no more favorable treatment' with regard to inspection of ships, detention, maintaining standard as mentioned in the convention has profoundly discussed. Furthermore, the most prominent 'The Estonia Accident case' has designated in this paper. In addition, how loading rules of ships in Bangladesh is associated in relation with SOLAS convention has been elaborately stated in this present paper. Lastly the dispensed strategies and various guidelines of IMO with concern to ensuring the safe manning and safety of life at sea has conversed in this contemporaneous writing.

Introduction

The SOLAS convention is generally considered the most significant international treaty in the dominion of safety of merchant ships. It deals with the seaworthiness of vessels and explains standards in regard to fire-safety measures, the carriage of navigational equipment and the construction of ships and lifesaving appliances.[136]As, the SOLAS convention leaves it predominantly to the *flag States* to denote and to enforce the standards of the Convention. Since the flag State has to ensure that vessels sailing under its flag comply with the Convention's requirements besides it has to issue the prescribed certificates as proof of compliance.[137] SOLAS Chapter V, Regulation 13 reads "*The Governments undertake, each for its national ships, to maintain, or if it is compulsory, to espouse measures for the purpose of*

[136] Tamo Zwinge, "Duties of Flag States to Implement And Enforce International Standards And Regulations - And Measures To Counter Their Failure To Do So" 10, no. 2 (2011): 297-308, https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1171&context=jibl.
[137] Ibid,305.

© This work is licensed under CC BY-NC-SA 4.0

ensuring that, from the point of view of safety of life at sea, all ships shall be sufficiently and proficiently manned''.[138]

In applying such principles, Administrations should take proper account of existing IMO, ILO, ITU and WHO instruments in force which deal with Watch keeping, hours of work or rest, safety management, training and certification of seafarers, occupational health and hygiene, and crew accommodation.[139] The SOLAS convention leaves it mostly to the flag States to imply and to enforce the standards of the Convention.[140] The flag State has to guarantee that vessels sailing under its flag observe with the Convention's requirements and it has to issue the prescribed certificates as proof of compliance.[141]

Port State Control in SOLAS

There are also provisions allowing port State control. A port State is hence allowed under the convention to verify if a vessel is of a SOLAS Convention. Thus, Member State disposes of the *necessary certificates* provided for in the Convention. The Convention nevertheless limits the extent of the inspections.[142]

Sohn & Noyes emphasizes that,

'Port State control inspections are normally limited to checking certificates and documents.[143] *But if certificates are not legal or if there are clear grounds for believing that the condition of the ship or of its equipment, or its crew, does not considerably meet the requirements of a relevant instrument, a more detailed inspection may be carried out.*[144] *If it turns out that a ship does not comply with the criterions obligatory by the Convention the port State should not let it navigate unless it leaves the port for the purpose of proceeding to the suitable repair yard.'*[145]

Consequently, it should be eminent that the port State is below the obligation to safeguard that ships, flying the flag of a State not party to SOLAS are given *no more favorable treatment than*

[138] Ibid.
[139] Ibid, 306.
[140] Ibid.
[141] Ibid.
[142] Ibid,307.
[143] CONFORMITY OF ZANZIBAR MARITIME LEGISLATION WITH INTERNATIONAL SAFETY CONVENTIONS AND ITS IMPLEMENTATION TO SAFEGUARD SAFETY OF LIFE AT SEA, ebook (University of OSLO, 2018), https://www.duo.uio.no/bitstream/handle/10852/22786/MasterxThesisxComplete.pdf?sequence=1&isAllowed=y.
[144] Ibid,12.
[145] Ibid, 13.

© This work is licensed under CC BY-NC-SA 4.0

ships under the flag of States which are a party. Thus, in consequence the port State should apply the standards of SOLAS to any ship in its port, regardless of its flag.

Chapter II states that, the construction of the vessel must be in the standard with which will guarantee maximum safety to the vessel itself, passenger on board and environment.[146]

The main requirements in construction, subdivision and constancy which are found on SOLAS is that ships shall be premeditated, constructed and maintained in compliance with structural, mechanical and electrical supplies of recognized classification society or with applicable national requirements of the Administration.[147]

The convention encompasses regulations which are designed to ensure that fires, materials such as carpets and wall covering are strictly controlled to lessen the fire risk. Moreover, that any fires are speedily noticed, and that any fire is contained and extinguished.[148] Nevertheless, Ship equipment's are very important in the safe operation of the ship in order to maximize sea safety. It includes lifesaving appliances radio communication and navigation equipment.[149]

Lifesaving appliances, life boats, rescue boats and life jackets are unequivocally explained in chapter three of SOLAS Convention which is exclusively compulsory for the state parties.[150] There is also a obligation for enhanced personal life-saving appliances as shielding suits which condense the body heat-loss of an individual in cold water and thermal conductivity aids (a bag or suit made of water-resistant substantial with low thermal conductivity.[151]

Safety of Navigation in SOLAS

This chapter necessitates governments to warrant that all vessels are satisfactorily and efficiently manned from a safety point of view. As , every seafarer must take account of all *impending endangerments to navigation, weather estimates, tidal predictions, the competence of the crew*, and all other applicable factors. Furthermore, it also adds an obligation for all vessels' masters to offer assistance to those in anguish and controls the consumption of lifesaving indications with specific requirements regarding danger and distress messages.[152]

[146] Ibid.
[147] Ibid, 14.
[148] Ibid.
[149] Ibid,15.
[150] Ibid.
[151] Ibid.
[152] Ibid.

© This work is licensed under CC BY-NC-SA 4.0

Regulation 33 provides a compulsion to the master of a ship at sea which is in a position to be able to provide assistance on receiving a indicator from any source that persons are in distress at sea, to ensue with all speed to their assistance.[153] Ship borne navigational equipment like nautical charts, nautical publication, navigation satellite system or a terrestrial radio navigation system is present.[154]

The Estonia Accident Case:

The Passenger Ferry *Estonia* departed from Tallinn, the capital of Estonia, on 27 September 1994 at 19.15 hours for a voyage to Stockholm, Sweden.[155] She carried 989 people, 803 of whom were passengers.[156] She sank in the Northern Baltic Sea in the early hours of 28 September 1994.[157] Only 137 passengers survived. According to the Accident Commission, the cause of the accident was that the design and manufacture of the bow visor locks were wrongly conducted, resulting the locks being too weak.[158] During bad weather conditions, the locks were broken and the visor fell off and pulled open the inner bow ramp.[159] Water flooded the main Ro-Ro deck. And the vessel stability and sank fully. [160]*Estonia* at her last voyage. Besides *it was fundamentally not sea worthy*.[161] And the commission identified that it did not full fill the SOLAS requirement for the voyage. [162]The crew also made mistakes, which partially contributed the loss of so many lives.[163] The *Estonia* tragedy also resulted in a surge of research into the phenomenon of Ro-Ro damage survivability.[164] And was instrumental in the adoption of the Northern European Regional damage stability standard SOLAS' 95 and the Stockholm Agreement.[165] *These standards require upgrading of virtually the construction of every equipment in the sea maintaining generally accepted standard for making the voyage sea worth.*

Administering Loading Rules of Ships in Bangladesh in Line with SOLAS

It is worrying to note that Bangladesh's ship owners are not following the *International Maritime Organization's (IMO's)* rules and regulations in loading containers, leading to grave

[153] Ibid, 13.
[154] Ibid.
[155] Wayne K Talley, Maritime Safety, Security And Piracy (London: Informa, 2008).
[156] Ibid,33.
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Ibid.
[161] Ibid.
[162] Ibid.
[163] Ibid.
[164] Ibid.
[165] Ibid.

© This work is licensed under CC BY-NC-SA 4.0

incidents at sea as well as economic loss and environmental pollution.[166] According to a report circulated in newspaper, it is none other than Bangladesh's shipping establishments have accused the ship owners of this. [167]It is worth mentioning that IMO, as a dedicated agency of the United Nations, is the comprehensive standard-setting authority for the safety, security and environmental performance of international shipping.[168]

The IMO had dispensed strategies regarding the verified gross mass (VGM) of a container carrying cargo in 2014, by amending the International Convention for the Safety of Life at Sea (SOLAS). [169]

The defilements of guidelines by the ship owners create stack collapses, damage to ships, cargo and the environment, and occasionally sinking of ships along with cargo.[170] As a solution to these, the IMO introduced the new rule for the VGM of containers before uploading them into ships and it is compulsory for all troubled to follow, not just the ship owners.[171] Additionally, the ship operators and managers, masters and officers of merchant ships, agents, charterers, cargo packers, cargo consolida-tors, haulers, freight forwarders, shippers, consignors, training providers, inspectors of cargoes, port authorities, ICD and off-dock operators, terminal operators and others complicated in transport of containers as well are all supposed to follow the new rule.[172]

In line with IMO guidelines, Bangladesh also familiarized the VGM system but it is sad to note that the technique is not being followed correctly.[173] As a result of which several shipping casualties have already occurred.[174] Moreover, the deviation also results in economic losses, including supply chain disruptions.[175] This is due to the fact that containers scheduled for carriage cannot be acknowledged as the vessel influences its permissible marks before the completion of loading on account of the deviation in gross mass of the containers.[176]

Conclusion

[166] The Independent, "Enforce Loading Rules Of Ships", 2018, http://www.theindependentbd.com/arcprint/details/52363/2016-07-23. Accessed, May 01, 2018.
[167] Ibid.
[168] Ibid.
[169] Ibid.
[170] Ibid.
[171] Ibid.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Ibid.
[176] Ibid.

© This work is licensed under CC BY-NC-SA 4.0

To conclude it can be said that, SOLAS Convention significantly implies for ensuring the sea worthiness of the vessel and ensuring the international safety standards for efficient manning and to combat all the dangers while boring in sea. Since innovative IMO strategies would ensure safety of the crew members and recover maritime safety, the relevant authorities must force the ship owners as well as the other people involved in the transport of containers to follow the new IMO guidelines for loading ships. The point is all loading of ships must be done under the regulatory framework of IMO.

Bibliography

Conformity of Zanzibar maritime legislation with international safety conventions and its implementation to safeguard safety of life at sea. Ebook. University of oslo, 2018. Https://www.duo.uio.no/bitstream/handle/10852/22786/masterxthesisxcomplete.pdf?sequence=1&isallowed=y.

Talley, wayne k. Maritime safety, security and piracy. London: informa, 2008.

The independent. "enforce loading rules of ships", 2018. Http://www.theindependentbd.com/arcprint/details/52363/2016-07-23.

Zwinge, tamo. "duties of flag states to implement and enforce international standards and regulations - and measures to counter their failure to do so" 10, no. 2 (2011): 297-308. Https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1171&context=jibl.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

Limited rights of the Borrowers in a Loan Recovery Process under the Money Loan Court Act (Artha Rin Adalat Ain) of Bangladesh

Barrister Al Amin Rahman and Tasmiah Nuhiya Ahmed,
Advocate, Supreme Court of Bangladesh

Abstract
Section 19 and Section 41 of the Artha Rin Adalat Ain 2003/ Section 6 and 7 of the Artha Rin Adalat Ain 1990 (collectively to be referred as the "Remedial Provisions") are treating the borrowers of banks/financial institutions discriminatingly against the lenders in a loan recovery process. Section 19 of the Artha Rin Adalat Ain 2003 provides that a borrower may file an application to the court to set aside an ex parte decree through depositing 10% of the total claim of the plaintiff bank or financial institution in the concerned financial institution. Section 41 of the Artha Rin Adalat Ain 2003 provides that in an Artha Rin suit, if a borrower is the aggrieved party, then the borrower can file the appeal application through depositing 50% of the decreetal amount in decree holder financial institution. A closure look reveals that these financial conditions have actually taken away the rights of the borrowers to file an application to the court to set aside an ex parte decree or to file the appeal application even though the law under Remedial Provisions apparently provides these rights. Such a deprivation leads to the breach of the fundamental right of the borrowers as enshrined under Article 27 & 31 of the Constitution of the People's Republic of Bangladesh. Hence, my paper shall discuss how the borrowers are being indirectly prevented from approaching to the courts for filing an application to set aside an ex parte decree or for filing an application of appeal against an order or decree passed by Artha Rin Adalat due to the financial burden upon them under the Remedial Provisions. The paper shall discuss the complaints of the borrowers with regards to the application of the Remedial Provisions and responses to those allegations of the borrowers provided by the courts. My paper shall also suggest few factors that could have been considered by the Court while dealing with borrowers' claims in this regard in order to avoid any kind of injustice to the borrowers in a loan recovery process under Artha Rin Adalat Ain.

Introduction

Section 19 and Section 41 of the Artha Rin Adalat Ain 2003 (Act of 2003) / Section 6 and 7 of the Artha Rin Adalat Ain 1990 (Act of 1990) (collectively to be referred as the "Remedial Provisions") are treating the borrowers of banks/financial institutions discriminatingly against the lenders in a loan recovery process. Section 19 of the Artha Rin Adalat Ain 2003 provides that a borrower may file an application to the court to set aside an ex parte decree through depositing 10% of the total claim of the plaintiff bank or financial institution in the concerned financial institution. Section 41 of the Artha Rin Adalat Ain 2003 provides that in an Artha Rin suit, if a borrower is the aggrieved party, then the borrower can file the appeal application through depositing 50% of the decreetal amount in decree holder financial institution. A closure look reveals that these financial conditions have actually taken away the rights of the borrowers

© This work is licensed under CC BY-NC-SA 4.0

to file an application to the court to set aside an ex parte decree or to file the appeal application even though the law under Remedial Provisions apparently provides these rights. Such a deprivation leads to the breach of the fundamental right of the borrowers as enshrined under Article 27 & 31 of the Constitution of the People's Republic of Bangladesh. Hence, the borrowers in Bangladesh exercising the rights guaranteed Article 44(1) of the Constitution, have gone to the courts several times to challenge the legality of the Remedial Provisions on the ground that they are in contravention with the Articles of the Constitution, most commonly referring to Article 27 and Article 31. However, so far they have not succeeded in establishing their claim before the courts.

The Act of 1990 provides in its preamble that this Act of 1990 was enacted for the purpose of recovery of loan by financial institutions. The Act of 2003 in its preamble states this law was enacted for the purpose of recovery of loans sanctioned by the financial institutions. Therefore, the law was enacted for swift and smooth recovery of loan by the financial institutions/banks from the borrowers. However, the law does not endorse to be applied creating injustice to any of the parties in a loan recovery process.

This paper shall broadly discuss how the borrowers are being indirectly prevented from approaching to the courts for filing an application to set aside an ex parte decree or for filing an application of appeal against an order or decree passed by Artha Rin Adalat due to the financial burden upon them under the Remedial Provisions. The paper shall also discuss the complaints of the borrowers with regards to the application of the Remedial Provisions and responses to those allegations of the borrowers provided by the courts. This paper shall suggest few factors that could have been considered by the courts while dealing with borrowers' claims in this regard in order to avoid any kind of injustice to the borrowers in a loan recovery process under Artha Rin Adalat Ain. This is an area that demands further research as it should be the prime concern of our courts to ensure that, laws of Bangladesh are being interpreted in such a way that guarantee protection of all fundamental rights of citizens.

Contested Provisions of the Artha Rin Adalat Ain

As the Act of 1990 had been repealed through the enactment of Act of 2003, the contested provisions of the newly enacted Act are Section 19 and Section 41.

Section 19 of the Act of 2003

Section 19 of the Act of 2003 more specifically deals with the process for a loan defaulter's application to set aside an ex parte decree. This Act of 2003 under Section 19 gives right to the borrowers the right to file a prayer for cancellation of an ex-parte decree, subject to the deposit of an amount of money equivalent to 10% of the claim of the plaintiff bank or financial institution in the concerned financial institution in cash or as security Bank Draft, Pay- Order or in the shape of any kind of encashable negotiable instrument in the court as admission thereof.

Section 41 of the Act of 2003

© This work is licensed under CC BY-NC-SA 4.0

Section 41 of the Act of 2003 provides the special provisions relating to the filing of appeal and settlement. Under section 41, the Act of 2003 grants a right of appeal to a party who has been aggrieved by order or decree passed by the Artha Rin Adalat. This section 41 requires the appellant borrower to make a deposit an amount equivalent to 50% of the decreetal amount in cash with decree holder financial institution.

How the Remedial Provisions work in practice

In case of prayer for cancellation of such ex-parte decree

If a borrower remains absent in the court on any date fixed for hearing of a artha rin suit, filed against the borrower by a bank or financial institution and in the event of non- appearance of the borrower on call after acceptance of the suit for hearing, then the court will dispose of the case ex – parte. In such a case, the borrower is given the right to file a prayer for cancellation of such ex-parte decree within thirty (30) days from the date of such ex-parte decree or from the date of his knowledge about such ex- parte decree, subject to the deposit of an amount of money equivalent to 10% of the claim of the plaintiff bank or financial institution in the concerned financial institution in cash or as security Bank Draft, Pay- Order or in the shape of any kind of encashable negotiable instrument in the court as admission thereof.

The prayer for cancellation of such ex-parte decree is accepted when an amount of money equivalent to 10% of the decretal amount is deposited. If accepted, the ex-parte decree will be cancelled and the original suit will revive in its previous number and file and the court will record an order in writing this effect and the suit will be conducted from the stage immediate after the stage in which it was decreed ex-parte.

However, if the borrower fails to deposit, in cash an amount equivalent to 10% of the decreetal amount as admission of the said amount of the claim of the plaintiff bank or financial institution in the concerned financial institution or Bank Draft, Pay order as security or any encashable negotiable instrument in the shape of security in the court, then the said prayer for cancellation of the ex-parte decree will be vacated; and the court will record an order in writing to this effect.

In case of prayer for Appeal

In an ArthaRin suit, if a party to the suit is aggrieved by the order or decree passed by Artha Rin Adalat then the aggrieved party may file an application for appeal. If the decretal amount is more than Taka 50,00, 000 (Taka Fifty Lacs) then an appeal can be preferred in the High Court and if the decretal amount is Taka 50, 00, 000 (Taka Fifty Lacs) or less, then an appeal can be preferred in the court of District Judge within subsequent 30 days. The appellant i.e. the borrower as per admission of the demand of the plaintiff bank or financial institution in part is required to make a deposit in cash with decree holder financial institution an amount equivalent to 50% of the decreetal amount. In case of denial of the demand of the plaintiff bank or financial institution, the appellant borrower is required to deposit in the court 50% of the decreetal

© This work is licensed under CC BY-NC-SA 4.0

amount as a security. The proof of depositing 50% of the decreetal amount should be submitted with the prayer or appeal memo in the court.

Constitutional Safeguards

Part III of the Constitution enumerates a host of rights called fundamental rights, which every individual is entitled to enjoy.

Article 26 of the Constitution provides that any law inconsistent with the provision of Part III of the Constitution, which provides the list of fundamental rights, becomes void to the extent of inconsistency. Further it also imposes an obligation upon the state to not make any law inconsistent with any provision of Part III of the Constitution.

Article 44(1) of the Constitution, which itself is a fundamental right of a citizen, provides the right to a citizen to move the High Court Division (HCD) of the Supreme Court of Bangladesh in accordance with Article 102(1), for the enforcement of the rights conferred by Part III of the Constitution. As it is mentioned above that that the financial conditions attached with the Remedial Provisions have actually taken away the rights of the borrowers to file an application to the court to set aside an ex parte decree or to file the appeal application even though the law under Remedial Provisions apparently provides these rights and this leads to the breach of the fundamental right of the borrowers as enshrined under Article 27 & 31 of the Constitution, the borrowers in Bangladesh exercising the rights guaranteed Article 44(1) of the Constitution, have gone to the courts several times claiming that the Remedial Provisions are in contravention with the Articles of the Constitution, most commonly referring to Article 27 and Article 31.

Article 102 of the Constitution empowers the HCD to give directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate, for the enforcement of any of the fundamental rights conferred by Part III of this Constitution, if satisfied that no other equally efficacious remedy is provided by law. Therefore, the Constitutional itself allows a floor towards the borrowers to step forward in the process of challenging the Act of 2003.

Current Status

Though the borrowers in Bangladesh have challenged the legality of the Remedial Provisions in courts several times, they have not succeeded in establishing their claim before the courts.

Claims of the Borrowers

- ✓ *Unreasonable, Oppressive and Arbitrary Provisions*

© This work is licensed under CC BY-NC-SA 4.0

The borrowers filed writ petitions asserting that the Remedial Provisions are unreasonable, oppressive and arbitrary as they impose financial burdens only upon the borrowers for enjoying the rights guaranteed under the Remedial Provisions.[177]

- ✓ *In Excess of the Requirements in Preserving the Purpose of the Enactment*

The borrowers also alleged that the Remedial Provisions have been enacted in excess of the requirements in preserving or achieving the governmental interest in quick realization of the dues on the banks and have detrimental effect on the business and property of the borrowers.[178]

- ✓ *Not an Equally Efficacious Remedy as required under Article 102*

The borrowers alleged before the courts that the Remedial Provisions are not equally efficacious remedy[179] as they impose a financial burden upon the borrowers for enjoying the rights guaranteed under the said Remedial Provisions.[180]

- ✓ *Taking away a vested right of appeal guaranteed under law*

The right of appeal is a vested right and cannot be taken away by a new law.[181] However, the financial conditions upon the borrowers under the Remedial Provisions have indirectly taken away the right of appeal from the borrowers.

- ✓ *Discrimination between borrowers and lenders;*

Borrowers also claim that Remedial Provisions are discriminating towards them. This is based on the fact that no financial burden is imposed upon the lenders as opposed to borrowers in a loan recovery process to enjoy the rights provided under the Remedial Provisions.[182] It is claimed by the borrowers that such classification of the borrowers of the financial institution does not rest on a just, fair reasonable and rational basis and is not sought to achieve the object of the Artha Rin Adalat Ain. The Remedial provisions are hence discriminatory in nature and as such these violate the equality provision of Article 27 of the Constitution. [183]

- ✓ *Discrimination between borrowers of financial institutions and borrowers of private persons and institutions*

The Remedial Provisions impose financial burden upon the borrowers for filing an application to set aside an ex parte decree or for filing an application of appeal. Order IX

---

[177] Anisur Rahman @ KM Ziaul Haque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others 12 BLC (HC) (2007) 22.
[178] *Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 4;
[179]*Abdul Gaffar Chowdhury V Joint District Judge, ArthaRinAdalat and others57 DLR 138;*
[180]*Zahirul Islam vs. National Bank Limited and others* 46 DLR (AD) (1994) 191, para 3 & 4;
[181]*Md. Nazimuddin vs the State* 30 DLR (FB) 49
[182]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 7;*
[183]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 7;*

© This work is licensed under CC BY-NC-SA 4.0

rule 13 of the Code of Civil Procedure 1908 does not impose such a financial burden upon any aggrieved party for filing an application to set aside an ex parte decree. Similarly, unlike section 41 of the Act of 2003, section 96 of the CPC 1908 does not impose any financial condition upon an aggrieved party for preferring an appeal.184 In this way the Remedial Provisions discriminated against the borrowers of the financial institutions. Borrowers from private persons and institutions other than financial institutions are also not required to make such deposit to file an application or to prefer an appeal against a decree passed in a money suit. Therefore, the borrowers from financial institutions have been discriminated against by classifying them together.

- ✓ *Constitutional Safeguard against Discrimination*

Article 27 provides that all citizens are equal before law and are entitled to equal protection of Law. Therefore if a borrower is discriminated then he is denied the right to enjoy the equal protection of law guaranteed under Article 27 of the Constitution.

- ✓ *Violation of Article 31*

The borrowers also proclaim before the courts that - Rule of law, which is one of the basic structures of the Constitution; is also violated by enacting the Remedial Provisions as these provisions treat the borrowers discriminatingly from other borrowers of private individuals and companies and such discrimination is not permissible. Article 31 provides that it is the inalienable right of every citizen within Bangladesh to enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, This Articles also provides that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken by the State except in accordance with law. As the borrowers are being deprived of the rights guaranteed under the law due to the financial conditions attached with the Remedial Provisions, they are also denied the right to enjoy the protection of law.

Our Courts' Response

In all the writ petitions filed by the borrowers, the courts have responded to each of the issues raised by the borrowers. The courts have denied the claims of the borrowers in these writ petitions and labeled the Remedial Provisions in following terms:

- ✓ *Alternative Efficacious Remedy –*

The courts have labeled the Remedial Provisions as alternative efficacious remedies. A writ petition is not maintainable when an alternative efficacious remedy towards the borrower is available under the Remedial Provisions. The judgment and decree passed by the Artha Rin Adalat are appealable under the Act of 2003. Hence, invoking the constitutional jurisdiction

[184] *Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 7;*

© This work is licensed under CC BY-NC-SA 4.0

as a redress against the judgment and decree passed by the Artha Rin Adalat has been discouraged by the courts.185

- ✓ *Not Unreasonable*

The courts have expressed the view that the Remedial Provisions in no way can be called unreasonable as the legislature has intentionally enacted the Remedial Provisions attaching financial conditions for realization of money by the banks and financial institutions from the defaulter borrower. The legislature for realization of money by the banks and financial institutions from the defaulter borrower enacted the provision for depositing 50% of the decretal amount in preferring appeal which cannot be said to be unreasonable.186

- ✓ *Settled Law*

The precondition of depositing 50% of the decretal amount for preferring appeal or filing an application for setting aside ex parte decree is common in the Acts. The same matter has been challenged in various other cases under the Act of 1990 and the issue has been settled by the High Court Division as well as by the Appellate Division in several decisions. It has already been settled that the Artha Rin Adalat is a Civil Court having all the powers and jurisdictions under the CPC 1908 subject to the provision of the said Acts. It has also been settled that the Acts provided that it is a civil court with confined and limited jurisdiction to deal with Artha Rin cases.187 The legislature has set down the financial condition that 50% of the decretal dues at the time of preferring an appeal or at the time of filing an application must be deposited which is a precondition for preferring an appeal.188 Therefore the courts expressed the view that the law is settled and the same has been endorsed by the High Court Division as well as by the Appellate Division in several decisions.

- ✓ *Legislature with clear intention has taken away the vested right of such defaulting borrowers of the banks/financial institutions to prefer appeal under section 96 of the CPC 1908*

Section 6 and 7 of the Act of 1990 were reinstated in section 19, 20 and 41 of the Act of 2003. A clear reading of these sections suggests that the parliament by clear and unambiguous terms has taken away the vested right of such defaulting borrowers of the banks/financial institutions to prefer appeal under section 96 of the CPC 1908. Since appeal

---

[185]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 6;
[186]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 6;
[187]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangla7desh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 12;

[188]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 9;

© This work is licensed under CC BY-NC-SA 4.0

is a creature of statute and unless the statute makes any provision for appeal here is no right to appeal under section 96 of the CPC 1908. [189]

✓ *Not a violation of a Right to Equality before Law*

The courts denied that the Remedial Provisions are violative of Article 27 of the Constitution with reasonings.[190] The financial institutions are not citizens and accordingly no question of violation of fundamental rights under Article 27 arises as and that the classification of the borrowers of the financial institutions is a reasonable and rational classification for achieving the object of speedy realization of loan advanced to such borrowers by financial institutions.[191]The court conveyed that Classification of the defaulting borrowers into a separate group to compel them to repay the loan advanced to them speedily is, neither unjust, unfair, unreasonable nor discriminatory but; necessary in the greater interest of the society. Such classification of defaulting borrowers of the financial institutions together into a separate group is with the object of removing the evil of the culture of defaulting repayment of loan and for speedy recovery of loan advanced to them and such object is relevant to the classification. No discrimination has been made as between the defaulting borrowers of the financial institutions in the Acts. Thus the Remedial Provisions have not violated the equality provisions of Article 27 of the Constitution as the same satisfies the twin test of reasonable classification and rational principle correlated to the object sought to be achieved. If the legislature takes care to reasonably classify persons for legislative purposes and if it deals equally with all persons belonging to a well-defined class, it is not open to the charge of denial of equal protection on the ground that the law does not apply to others also. [192]

✓ Reasonableness of the classification of the Borrowers

While considering whether the classification for the purpose of legislation is permissible, the decision in the case of *State of West Bengal vs Anwar Ali* reported in AIR 1952 SC 75 has been seen by the Courts. In this case, West Bengal Special Courts Act 1950 authorising the State Government to transfer any criminal case from ordinary criminal court to a special tribunal for speedy trial was declared ultra vires of Article 14 of the Constitution of India on the ground that it ignored the principle of classification followed in the Code of Criminal Procedure and it proceeded to lay down a new procedure without making any attempt to particularize or classify the offences or cases to which it is to apply.[193]

---

[189]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 14;

[190]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 5;*

[191]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 5;*

[192]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 16;*

[193]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 11;*

© This work is licensed under CC BY-NC-SA 4.0

After the Constitution of Pakistan 1956 came into force provisions of Section 3 and 31 of the State Acquisition and Tenancy Act 1950 providing for compulsory acquisition of rent-receiving interests and payment of compensation at different rates was challenged as violative of the equality provision of Article 5 of the Constitution of Pakistan 1956 in the case ofJibendra Kishore vs Province of East Pakistan[194]. The contention was rejected by the Pakistan Supreme Court observing as follows:

"*Another generalization more frequently stated is that the guarantee of equal protection of law requires that all persons shall be treated alike under like circumstances and conditions both in the privileges conferred and in the liabilities imposed. In the application of these principles, however, it has always been recognized that classification of persons or things is no way repugnant to the equality doctrine, provided the classification is not arbitrary or capricious, is natural and reasonable and bears a fair and substantial relation to the object of the legislation.*"[195]

Supreme Court of India in the case of *DS Nakaravs Union of India* reported in AIR 1983 (SC) 130 while declaring classification of government pensioners merely on the basis of specified date of retirement for payment of increased rate of pension as violative of equality provision of Article 14 of the Constitution of India observed as follows:
"*Legislative or executive action may accordingly be sustained if it satisfies the twin test of reasonable classification and the rationale principle correlated to the object sought to be achieve.*".[196]

Same question arose in the case of *S.A. Sabur vs. Returning Officer.*[197] In that case, amended provision of section 7 (2)(g) of the Local Government (Union Parishad) Ordinance 1983, disqualifying defaulting borrowers of specified banks from seeking election to the office of Chairman or member of Union Parishad, was challenged on the ground that the said provision is violative of the equality provision of Article 27 of the Constitution. Our Appellate Division after reviewing the decision of the USA, India and Pakistan on the question of violation of the equality provision of the Constitution repelled the said contention observing as follows:
"*Equality before Law is not to be interpreted in its absolute sense to hold that all persons are equal in all respects disregarding different conditions and circumstances in which they are placed or special qualities and characteristics which some of them may possess but which are lacking in others*".

It was further observed in the case of *S.A. Sabur vs. Returning Officer* [198]that-
"*The legislature while proceeding to make law with certain object in view, which is either to remove some evil or to confer some benefit has power to make classification on reasonable*

[194]9 DLR (SC) 21;
[195]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 13;*
[196]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 14;*
[197]41 DLR (AD) 30;
[198]41 DLR (AD) 30;

© This work is licensed under CC BY-NC-SA 4.0

basis. Classification of persons for the purpose of legislation is different from class legislation, which is forbidden. To stand the test of "equality" classification besides being based on inteliigible differentia must have reasonable nexus with the object legislature intends to achieve by making the classification".[199]

- ✓ *Not a violation of Right to Protection of Law*

The precondition of depositing 50% of the decretal dues at the time of preferring an appeal or at the time of filing an application has been imposed by the legislature, who has the power to take away any vested right by clear and unambiguous language. The courts have expressed their view that this precondition cannot be said to have taken away the right to protection of law guaranteed under Article 31 of the Constitution.[200]

The Acts being enacted by the Parliament and all borrowers and financial institutions being treated on the same footing and they being at liberty to take protection under the Acts and section 6(2) and 7 of the Act of 1990 being similar to section 19 of the Act of 2003 giving right to the borrowers to redress against the judgment and decree, whether ex parte or contested; it cannot be said that such defaulting borrowers have lost their fundamental right of protection of law or to be treated in accordance with law as enshrined in Article 31 of the Constitution.[201]

- ✓ *Putting an end to the evil Culture of Non- Payment of Loan*

Artha Rin Adalat Ain was enacted by the legislature to put an end to the culture of nonpayment of loan by the borrowers obtained from banks/financial institutions, which was developed amongst a class of borrowers. This is evidenced in the preamble of both the Acts.202 To put an end to this wicked culture of non-payment of loan advanced to them, they have been grouped together and special provisions have been made under the Remedial Provisions so that they cannot delay the payment of decretal dues for long by filing application under Order IX Rule 13 of the CPC 1908 and/or preferring appeal/staying execution of the decree for a long time without paying at least half of the decretal dues.[203]

The borrowers of banks/financial institutions invest the loan advanced to them in their respective trade, commerce and industry. Banks/Financial institutions deal with money deposited with them by private individuals from their savings or by government from revenue earnings and borrowing from inside and outside the country. These banks/financial institutions

---

[199]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 15;*

[200]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 9;

[201]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 15;

[202]*Anisur Rahman @ KM ZiaulHaque vs. Government of Bangladesh represented by the Secretary, Ministry of Law and others* 12 BLC (HC) (2007) 22, para 10;

[203]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 10;*

© This work is licensed under CC BY-NC-SA 4.0

in their turn advance the money deposited with them to borrowers, who are mostly engaged in trade, commerce and industries for profit making to further economic activities in the country for greater benefit of the society on condition of repaying the same with interest within the stipulated time. If such borrowers do not pay the loan with interest as per the stipulation in the agreements within time then the banks/financial institutions will face liquidity problem and will not be able to advance loan to new-comers and thus monopolistic tendency will develop in trade, commerce and in industries depriving new comers the facility of loan from financial institutions. These borrowers are a class by themselves as they borrow money from banks/financial institutions. So the defaulting borrowers of the banks/financial institutions group together and special provisions have been made in the Acts to compel them to pay the loan advanced to them. These borrowers have developed the culture of non-payment of the same to the detriment of the society at large and for their own benefit only. They do not stand on the same footing with other borrowers from private individuals or institutions other than the financial institutions. They also do not stand on the same footing with the plaintiffs of the ArthaRinAdalat Suits who are neither citizens nor enjoying the same advantages with the defendants of such suits (i.e. the borrowers) rather suffering at the hands of such borrowers. These defaulting borrowers of financial institutions cannot claim any privilege of continuing with their culture of defaulting repayment of loans and indefinitely withhold the same taking resort to the dilatory process of the ordinary civil litigation in the civil court.[204]

- ✓ *Purpose of the Enactment*

The Act of 1990 was passed by the parliament making special provisions for the purpose of realization of loan amount advanced by any financial institution. The preamble and the long title of the Act of 1990 mentioned the purpose of the enactment of the law and that is for the recovery of loan advanced by any financial institution. Section 2 (ka) enumerated the financial institutions which have been given the benefit of this Act of 1990 for recovery of loan as defined in Section 2 (kha) of this Act of 1990. Section 3 provides that unless there is anything to the contrary in the Act of 1990 the provisions of the Act of 1990 are in addition to the provisions of other laws and will not affect the same. Section 4 provides for establishment of one or more ArthaRinAdalat.[205]

The object, as was stated in the Bills of the Acts placed before the Parliament;is that it is necessary to put an end to the existing situation that borrowers of banks and financial institutions are not repaying the loan within time and long time is required to dispose of cases for realization of loan of banks and financial institutions under the prevailing law. At time it is not at all possible to realize loan of banks and financial institutions. [206]

---

[204]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 16;*
[205]*Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 8;*
[206] *Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 10;*

© This work is licensed under CC BY-NC-SA 4.0

The object of the enactment of the Acts was to provide for speedy recovery of long pending outstanding loans advanced by the financial institutions to the borrowers, who are mostly engaged in trade, commerce and industries for profit making, who developed a culture of non-payment of loan advanced to them.[207]

Therefore, the courts have viewed the challenges by the Defaulter borrowers in a negative way as it has been expressed by the courts that the borrowers resort to this remedy to restrain banks/financial institutions from proceeding with the execution case, to ultimately suffer loss and damage. This delaying tactic adopted by the defaulter borrowers misleads a court and has never been appreciated by our judiciary. Hence this kind of ill-motivated act is not expected from any citizen and should not be encouraged in any circumstance.[208]

- ✓ *A mere condition of Appeal – not to be equated with other laws*

The courts of Bangladesh justified the condition of appeal through referring it as a mere condition of appeal in a regular suit which cannot be equated with other laws. In response to borrowers' argument that to make a deposit of half of the decretal dues is no efficacious remedy for the borrower, the court stated that it is a misconceived submission by the borrowers.[209]

- ✓ *No discrimination between the borrowers*

Amongst the same class of borrowers there has not been made any discrimination. All the borrowers of the financial institutions have been grouped together and the rigorous provision of the Remedial Provisions equally applicable to all of them. They do not stand on the same footing with the borrowers from private persons and institutions other than the financial institutions.

Factors that could have been considered by Courts to avoid mistreatment towards the Borrowers in a Loan Recovery Process

- ➢ *Resorting to Legal Means*

Banks have the right to recover loans but only through legal means only. The Remedial Provisions are enacted in favour of the banks and financial institutions only and hence judicial reforms are required to ensure that the rights of the borrowers are satisfactorily protected against the rights of banks and financial institutions. The Central Bank of Bangladesh may come forward to issue guidelines with a view to controlling this kind of bad practices in our society. Financial institutions should be instructed by the Central Banks that they are bound by law and that they should ensure that none of their acts goes contrary to establishing rule of law in a country.

---

[207] *Chandpur Jute Supplier owned by Sekander Khan Chandpur and others V Subordinate Judge, ArthaRinAdalat, Chandpur and others 2 BLC (1997) (HCD) 49, para 10;*

[208] The Loan Recovery Process by Al Amin Rahman, published in the Daily Star on 12 July 2016; http://www.thedailystar.net/law-our-rights/the-loan-recovery-process-1252177

[209] *Zahirul Islam vs. National Bank Limited and others* 46 DLR (AD) (1994) 191, para 3 & 4;

© This work is licensed under CC BY-NC-SA 4.0

- *No reasonable justification for attaching financial condition with Remedial Provisions*

Section 96[210] of the CPC 1908 provides the provision for appeal from original decree of a civil court and it does not attach any financial condition for preferring an appeal by the aggrieved party. Against the *ex parte* decree the judgment debtor can file an application under Order IX Rule 13 of the CPC 1908, which also does not attach any financial condition for the same. The High Court Division (HCD) of the Supreme Court of Bangladesh has observed that the Act of 2003 is guided by the principles of the CPC 1908. However, no reasonable justification could be provided by the court in this connection.[211] Moreover, a fixed amount of application fee could have been imposed upon the borrowers for filing appeal or challenging ex parte decree. But the amount to be deposited under the Remedial Provisions varies depending upon the decreetal amount which is unusual and unreasonable.

- *Legislations to pass the test of reasonableness*

Legislations should pass the test of reasonableness unless it becomes clear that the legislators acting reasonably could not have passed the challenged law. In making an inquiry into the reasonableness of a law, the courts are supposed to keep in mind the existing economic and social conditions and the current values of the society with reference to which reasonableness or fairness of a law or procedure will have to be judged. Hence, this matter should be left open for inquiry to determine if the Remedial Provisions will pass the test of reasonableness or not.

- *Right of being heard*

When a defaulter borrower has been aggrieved by a decision of Artha Rin Adalat, he should be given the chance to be heard when he intends to file an appeal or challenge an ex parte decree. The essence of the concept is fairness and avoidance of arbitrariness. It should be noted that an application made in the fairest procedure may destroy the enjoyment of life, liberty or property if the law is unreasonable and arbitrary.

- *Floodgate of Cases through invoking Writ Jurisdiction*

This financial burden upon the borrowers under the Remedial Provisions to file applications for challenging an ex parte decree or for an appeal is actually putting a full stop on their scope of exercising their right guaranteed under the Remedial Provisions of Act of 2003. As a consequence, this closure is opening the floodgate of cases in higher courts as the aggrieved

[210]Section 96 of the CPC 1908 provides- 96.(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court. 96.(1) Save where otherwise expressly provided in the body of this
(2) An appeal may lie from an original decree passed ex parte.
(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

[211]*Korea Bangladesh Food Products Ltd vs. National Bank Ltd* 13 MLR (AD) (2008) 253;

© This work is licensed under CC BY-NC-SA 4.0

borrowers find no other alternatives to safeguard their interest other than invoking the writ jurisdiction. [212]

- *Efficacious Remedy*

The Remedial Provisions, due to attaching the financial burden; do not ensure efficacious remedy to the aggrieved borrowers. Efficacious remedy implies a form of relief that can be obtained at a different forum from the current forum. It is generally necessary to exhaust other efficacious remedy before filing writ petition. However, since the Remedial Provisions are not of help to the aggrieved borrowers, they file writ petitions challenging these Remedial Provisions before the High Court finding no other redress.

- *Terming as mere conditions without properly defining the same*

The courts have referred these financial conditions as mere conditions without properly defining that what they mean by this term. Moreover, a general understanding suggests that such a huge financial burden as under the Remedial Provisions cannot be regarded as mere condition.

- *No greater injustice than to take away someone's right to come before court*

Section 20 213 of the Act of 2003 puts a complete bar on challenging any proceeding, order, judgment or decree of the Artha Rin Adalat before any court or authority save in the manner provided under the Act.214 The remedy of resorting before court in case any injustice occurs to the borrowers has been restricted through section 20 of the Act of 2003. There cannot be anything injustice than to take away someone's right to come before court. However, maintaining a separate suit regarding the subject matter of an artharin suit has been prohibited.215 This principle leaves the borrowers with no remedy at all since section 19 and 41 of the Act of 2003 attach a huge financial burden for challenging the decisions of Artha Rin Adalat.

- *Deprivation of the right of appeal or right to challenge an ex parte decree of the borrowers should not be encouraged*

The courts have the view that the purpose of enacting the Acts justifies the conditions under the Remedial Provision, it deprives the borrower from enjoying the rights of redress under these Remedial Provisions, which practice should be discouraged in every possible way.

---

[212]The defaulter borrowers often refer to two Articles, namely Article 27 and Article 31 to challenge the Act of 2003 in the HCD of Bangladesh under Article 102 of the Constitution. Article 44(1) of the Constitution, which itself is a fundamental right of a citizen, provides the right to a citizen to move the HCD in accordance with Article 102(1), for the enforcement of the rights conferred by Part III of the Constitution. See more at http://www.thedailystar.net/law-our-rights/the-loan-recovery-process-1252177

[213]Section 20 of the Act provides that no question can be raised before any court or authority about any pending proceeding in the ArthaRinAdalat, or its order, judgment or decree, and if any relief is claimed or prayed before any court or authority ignoring the provisions of the Act, no court or authority shall accept any such prayer. The judgment or decree of the ArthaRinAdalatis final and the same cannot be questioned in any other court under any separate proceeding.

214*AB Bank vs. Salauddin*, 16 BLC (2011) 277, at Para 8,

215*BSRS vs. Rahman Textile Mills Ltd.*51 DLR (AD) (1999) 221,

© This work is licensed under CC BY-NC-SA 4.0

- *Satisfying the test of Constitutionality*

The classification of the borrowers in the Act of 2003 shall satisfy the test of constitutionality if the same is logically correct and it can be rationally linked with the object sought to be achieved by the Act of 2003. However, the financial conditions under the Remedial Provisions are likely to contravene with the rights of the borrowers guaranteed under the Remedial Provisions, which cannot be said to be logically correct and hence, cannot satisfy the test of Constitutionality.

- *Do we really need a tough law for reducing the number of non-performing loan?*

The World Bank report, which provides data on non-performing loan in Bangladesh for the period between the years 1998 to 2015, suggests that the percentage of non-performing loans in Bangladesh mirrors the well-being of the banking sector in Bangladesh and hence, a question arises whether at all we need such a tough law for realization of loan money from defaulters.

- *Right of Equality before Law- a positive concept and cannot be enforced in court in a negative manner:*

The guarantee of equality is a positive concept and cannot be enforced in court in a negative manner. Before a claim based on equality clause is upheld, the petitioner must establish that although his claim is just and legal, he has been denied the same and has been subject to discrimination.

If the borrowers are denied the right to enjoy equality before law in a loan recovery process against the lenders then it may be said that they are subject to discrimination and it will ultimately lead the right to equality to be enforced in a negative manner.

- *No law shocking to conscience can pass the test of Reasonable classification:*

If a differential treatment satisfies the twin test of logical classification and reasonableness, it cannot be shocking to conscience. If any legal provision or action is shocking to conscience, it will often, if not always, be arbitrary and it will fail to pass the test of reasonable classification. Reasonableness of a classification has to be decided with reference to the realities of life and not in the abstract.[216] Therefore, as it seems that the Remedial Provisions are apparently shocking to conscience, they may be treated as arbitrary and not likely to pass the test of reasonable classification.

Conclusion

The financial burden upon the defaulter borrowers as imposed under the Remedial Provisions provide the borrowers with no redress of genuine grievances when injustice is perpetrated on them in a loan recovery process. Moreover, the prohibition under section 20 of the Act of 2003 adds a separate dimension in this deprivation mission. Civil courts are court of ultimate jurisdiction and in cases, where no other remedy is provided for; the door of the civil courts should not be closed and hermitically sealed against one who has been subjected to injustice.

[216]Trimble V Gordon, 430 US 762, Carington V Rash, 380 US 89;

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

Hence, kind attention of the relevant groups of our society is required to scrutinize these Remedial Provision one more time taking into account the above mentioned discussion.

Published by **South Asian Journal of Law & Policy**, ISSN: 2616-8197, Volume 01, April 2021
© This work is licensed under CC BY-NC-SA 4.0

*** The End ***

www.sajlp.org